Supreme Court, U.S.
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No. 00-1080

In The

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, NATIONAL ASSOCIATION OF SECURITIES DEALERS, DONALDSON, LUFKIN JENRETTE SECURITIES CORPORATION, AND JOHN R. WILLSEN,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

CORRECTED
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the non-conviction arrest record inquiry required by 17 C.F.R. § 240.17a-3(a)(12)(i)(g) comply with Title VII of the Civil Rights Act of 1964, state anti-discrimination laws, and public policy?

2. Are the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) state actors?

3. Is the mere filing of a Form U-5, without more, an initial step in the NASD's and the NYSE's quasi-judicial process such that all Form U-5's are entitled to absolute privilege?

4. Under applicable NYSE and NASD rules, was DLJ required to file a Form U-5 in the circumstances of my case?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page, except the Solicitor General of the United States.

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Petitioner Randy Britton respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is unreported; however, it is reprinted at Appendix A, page 1a. The orders and reports of the District Court are also unreported, but they are at Appendices B through E.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 15, 2000. The Second Circuit denied a timely filed petition for rehearing and petition for rehearing en banc on September 29, 2000 (App. F, page 61a). This petition is filed within 90 days of September 29, 2000, as permitted under Rule 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment: Due Process and Prohibition on Self Incrimination

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 2000e(a): Definition of Person for Purposes of Title VII of the Civil Rights Act of 1964

The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

42 U.S.C. § 2000e(b): Definition of Employer for Purposes of Title VII of the Civil Rights Act of 1964

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26,

except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e-2(b): Unlawful Employment Practices that Violate Title VII of the Civil Rights Act of 1964

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

17 C.F.R. § 240.17a-3(a)(12)(i)(g): SEC Regulation Requiring the Arrest Record Inquiry

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, as amended, (48 Stat. 895, 49 Stat. 1377, 52 Stat. 1075; 15 U.S.C. 78o) shall make and keep current the following books and records relating to his business:

(12)(i) A questionnaire or application for employment executed by each "associated person" (as hereinafter defined) of such member, broker or dealer, which questionnaire or application shall be approved in writing by an authorized representative of such member, broker

or dealer and shall contain at least the following information with respect to such person:

(g) A record of any arrest or indictment for any felony, or any misdemeanor pertaining to securities, commodities, banking, insurance or real estate (including, but not limited to, acting or being associated with a broker- dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association), fraud, false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting or extortion, and the disposition of the foregoing.

(ii) For purposes of this paragraph (12) the term "associated person" shall mean a partner, officer, director, salesman, trader, manager, or any employee handling funds or securities or soliciting transactions or accounts for such member, broker or dealer.

NYSE Rule 345.17 (1991): NYSE Form U-5 Filing Requirements

The discharge or termination of employment of any *registered* person together with the reasons thereof, shall be reported promptly, but in any event not later than thirty days following termination, to the Exchange on a U-5 Form. A copy of said termination notice shall be provided concurrently to the person whose association has been terminated. [Emphasis Added].

NASD by-law Art IV § 3(a)(1991): NASD Form U-5 Filing Requirements

Following the termination of the association with a member of a person who is *registered* with it, such member shall promptly . . . give notice to the Association on a form designated by the Board of Governors . . . ." [Emphasis Added].

STATEMENT OF THE CASE AND DISTRICT COURT JURISDICTION

A. Underlying Facts of the Case

> Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won. Endow us with courage that is born of loyalty to all that is noble and worthy, that scorns to compromise with vice and injustice and knows no fear when truth and right are in jeopardy.
>
> Excerpt from the Cadet Prayer
> United States Military Academy, West Point, NY

To uphold these words, I, Pro Se Petitioner Randy Britton, the third African-American to graduate from both West Point and Harvard Business School, appeal against the SEC, the NYSE, the NASD, DLJ, and DLJ's agents. I am a Certified Public Accountant earning honors[1] in law school. While the Honorable Judge Kimba Wood disagreed with my legal arguments and misapprehended the material facts, she could not doubt the sincerity of my belief that I am right.

Like other well-educated African-Americans in general, and Black West Pointers in particular, I have faced racist obstacles to progress and glass ceilings. Institutional racism on Wall Street is more blatant than anywhere else in America. I cannot change the world, or even this Country, but with the proper rulings from this Court, we can stop the racist practices that have permeated Wall Street with the imprimatur of the United States of America since 1961[2].

In 1975, the SEC determined that SEC Rule 17a-3, a federal regulation, trumped Title VII of the Civil Rights Act of 1964, a federal statute, because the SEC determined that the arrest

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[1] To date, I have earned all A's with the sole exception being a first semester B in Property.

[2] *Order Approving Change to SEC Rule 17a-3*, Exchange Act Release No. 6646, 1961 WL 8080, 1975 SEC LEXIS 951 (October 6, 1961).

record inquiry, although outlawed by Title VII and state anti-discrimination laws, could be legally required by federal regulation.[3] Any second year law student knows that federal statutes trump federal regulations[4], if they conflict, as they do here, so SEC Rule 17a-3 cannot stand in opposition to Title VII of the Civil Rights Act of 1964. Moreover, a state anti-discrimination law cannot be pre-empted if it outlaws the same acts as a federal statute. Cf. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 108, 103 S. Ct. 2890, 2906 (1983).

State anti-discrimination law cannot be pre-empted because any Federal law attempting to cause, foster, or condone racial discrimination would violate the 5th and 14th Amendments. *Reitman v. Mulkey*, 387 U.S. 369, 381, 87 S.Ct. 1627, 1634 (1967); *Bell v. Maryland*, 378 U.S. 226, 292, 84 S. Ct. 1814, 1850 (1964)(Goldberg, Douglas, JJ., and Warren, C.J., concurring)("The Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil Rights Act of 1866, 14 Stat. 27, and to place that legislation beyond the power of congressional repeal.")

State Anti-Discrimination/Fair Employment Laws are incorporated by reference into Title VII's federal regulatory scheme. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 477, 102 S. Ct. 1883, 1895 (1982)("state fair employment practice laws are explicitly made part of the Title VII enforcement scheme"). Therefore, on the pre-emption battlefield, state anti-discrimination laws are encased in federal, not merely state, armor. Only a change in the U.S. Constitution that makes racial discrimination legal can set up an environment whereby a state anti-discrimination law can be pre-empted, repealed, or rendered impotent.

Nevertheless, by using a combination of standing and subject matter jurisdictional defenses, the SEC has avoided judi-

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[3] *Order Approving Change to SEC Rule 17a-3*, Exchange Act Release No. 11615, 7 SEC Docket 710, 1975 SEC LEXIS 951 (August 25, 1975).

[4] *Contini v. Hyundai Motor Company*, 840 F. Supp. 22, 24 (S.D.N.Y. 1993)("To hold a federal regulation binding if a federal statute expressly states the contrary, would, however, violate federal law contrary to the Supremacy Clause contained in Article VI § 2 of the Constitution.")

cial scrutiny of the illegal arrest record inquiry on the merits for over 25 years. Nevertheless, this Court has the power to determine whether a federal statute trumps a conflicting federal regulation, and I have standing to bring this suit because I have been personally affected by this conflict, and a favorable ruling from this Court will lead to adequate relief for me upon remand to the Second Circuit.

As the third African-American to graduate from both West Point and Harvard Business School, I have been selected by the hands of fate to test the legality of Wall Street's racist environment. Numerous state and federal laws prohibit what goes on every day on Wall Street, yet the racism continues with impunity. See App. H., page 67a where a ruling from the EEOC denounced the arrest record inquiry as a violation of Title VII, yet the SEC ignored this declaration even though the SEC considered it during its 1975 SEC Rule 17a-3 rulemaking process. I obtained this EEOC ruling from the 1975 SEC file that contains public comments. It is ironic that the NYSE secured this EEOC's ruling and forwarded it to the SEC for consideration. See the NYSE cover letter at page 68a. The SEC, the NYSE, and the NASD all claim to be above this nation's anti-discrimination laws. The holding of this Court must tell them the truth: no one is above the law.

This explains why it is futile to attempt to exhaust my administrative remedies before the SEC. If the SEC will not listen to the EEOC, it is clearly futile for me to re-argue the same points that the EEOC has already made. Accordingly, access to the Courts without exhausting my administrative remedies is appropriate because the Courts will not require futile attempts to re-litigate before an agency that has already ruled against the points offered and is actively enforcing the rule. *Houghton v. Shafer*, 392 U.S. 639, 640, 88 S. Ct. 2119, 2120 (1968); *Guitard v. U.S. Secretary of Navy*, 967 F.2d 737, 741 (2nd Cir. 1992).

Clearly, something is rotten on Wall Street when DLJ claims to have fired me for alleged misconduct, and then DLJ pays me $150,000, notwithstanding my alleged misconduct, to keep quiet. My alleged misconduct included (1) allegedly lying on an employment form (Form U-4 question

22b) by leaving off Maloney's[5] trumped up assault charges as I am permitted to do by law, (2) refusing to supply a written statement to DLJ and the NYSE concerning the nature and circumstances surrounding favorably closed misdemeanor arrests and charges that did not result in a conviction as I am permitted to do by the Self Incrimination Clause of the Fifth Amendment as well as state anti-discrimination law, and (3) alleged insubordination when I wrote a letter refusing to supply the illegally requested information that informed DLJ and the NYSE that I would be standing on my rights. As explained below with syllogistic logic (page 29), I did not lie on the Form U-4 and *all* of my actions are protected activity under state and federal constitutional and anti-discrimination laws.

> No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Mass. Gen. L. Ch. 151B, § 4 ¶ 9 (1991).

I did nothing wrong; I did what the law explicitly permits. The reason DLJ paid me the $150,000 after taxes is simple; DLJ sought to conceal its Public Finance Division Registration Scandal. When eventually exposed, the registration scandal resulted in DLJ's public censure by the NASD. Combined with the Public Finance Division's other fraudulent misconduct, DLJ's senior management was prompted to close down DLJ's Public Finance Division in the hopes of avoiding a fuller investigation into DLJ's other misconduct.

Sometimes David, out-numbered and out-financed, armed only with the facts and the law, defeats Goliath. This is such a case. My efforts in this case, over the past seven years, to

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[5] See U.S. Supreme Court Docket Number 00-1568 which recounts my $200,000 federal jury malicious prosecution victory over a rogue Boston Police officer, Patrick J. Maloney.

attack the institutionalized racism that keeps African-Americans off Wall Street, ranks me, in the annals of the Civil Rights Movement, with Rosa Parks, Martin Luther King Jr., Jesse Jackson, and Malcolm X; we have all been arrested and falsely charged. The rest, and indeed the most important part, is up to this Court: only this Court can stop the institutionalized racism, and this Court can do it with the stroke of a pen.

The first two African-American graduates of West Point. Henry O. Flipper, Class of 1877, and Jonathan C. Whitaker, Class of 1880, were falsely accused of crimes and discharged from the service with dishonorable discharges because they held their heads up high and refused to cowtow to their fellow white officers. Later, many years after their deaths, Congress would over turn their convictions, and grant them commissions with honorable discharges. For them, as for me, there is no shame in being arrested or falsely accused of a crime; the shame would be in selling out just to be a part of the club. Being an Uncle Tom is far far more dishonorable than incurring the wrath of white Americans because of your proud demeanor, consistent with being a West Pointer. Like Flipper and Whitaker, I too have been falsely accused of crimes, but because of the fair-minded Courts that exist today, I have prevailed at every turn, never having been convicted.

The dishonor is that the SEC requires securities industry employers to use non-conviction arrests and charges to make employment decisions[6], in violation of state and federal anti-discrimination laws. *In re Ruggiero*, 263 A.D.2d 254, 693 N.Y.S.2d 266, 268-269 (1999). When I resisted DLJ's application of this illegal policy to me, refused to cowtow, and refused to sign a false confession, I was fired on December 16, 1991.

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[6] The SEC has retorted that employers are not barred from hiring non-convicted arrestees, but in its brief filed in *Association of Investment Brokers v. SEC*, 676 F.2d 857 (D.C. Cir. 1982), the SEC publicly announced that it would target for investigation firms that hired a number of non-convicted arrestees.

The next day I appeared before work and started to clean out my desk. I handed Defendant Managing Director Marino, a letter dated December 17, 1991. The letter explained why I thought they were wrong and it let him know that I knew that DLJ had unregistered people working, in violation of federal securities laws. Marino offered me $30,000 on the spot to sign a release. I told him I would have to think about it. Later I explained that these things were expensive to litigate, so he increased the amount to $100,000. I did not fully understand why DLJ would fire me and then pay me more than a year's salary ($60,000) to sign a release. I started asking questions. The salient question was how did DLJ discover the false Massachusetts assault charges that they accused me of improperly leaving off of my Form U-4. These are the false charges Maloney trumped up. See footnote 5.

Massachusetts's privacy scheme[7] should have prevented DLJ or any member of the public from accessing these favorably closed charges. It turns out that DLJ hired two private investigators, who used illegal means, perhaps a bribe, to circumvent the Massachusetts privacy scheme to get two Police Officers to access my police records via computer and supply these investigators with the docket numbers of my cases, all in violation of Massachusetts Criminal Offender Record Information (CORI) Laws, Mass. Gen. L. ch. 6, § 172 et. seq. Armed with the docket numbers, the private investigators could get the files.

Because I wanted to make a stand on principle, I wanted to sue DLJ and the NYSE. I believed their actions were illegal. However, it came to light, based on my discussions with an attorney who worked in the New York State Securities Of-

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[7] The Massachusetts privacy scheme was explained by the Massachusetts Supreme Judicial Court in *New Bedford Standard-Times Publishing Company v. Clerk of the Third District Court Of Bristol*, 377 Mass. 404, 387 N.E.2d 110 (1979). The Massachusetts privacy scheme made the alphabetical name index of criminal defendants secret. It was March 1993 before a federal judge struck down the Massachusetts privacy scheme for violating the First Amendment. *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 93 (D. Mass. 1993).

fice, that perhaps SEC Rule 17a-3 was a law that legalized the otherwise illegal arrest/charge record inquiry. The Attorney said that the arrest/charge record inquiry was specifically required so SEC Rule 17a-3 met the "specifically required" exception to N.Y. Exec Law § 296[16] (1991). I was not sure that DLJ's and the NYSE's actions would be viewed as illegal by a Court. In fact, Judge Wood and the Second Circuit view their actions as legal. However, a recent New York Appellate Division case has ruled that SEC Rule 17a-3 does *not* make the illegal arrest/charge record inquiry legal. *In re Ruggiero*, 263 A.D.2d 254, 693 N.Y.S.2d 266, 269 (1999). This unanimous ruling by five New York Appellate Judges trumps the advisory opinion.

It became clear to DLJ that I would not settle unless and until they told me how they discovered the Massachusetts assault charges that Maloney trumped up. Amended Complaint filed in 93 cv 3746, ¶ 154. DLJ knew that I wanted good grounds to sue, and they knew that if they told me that they used two private investigators to violate the Massachusetts CORI Laws, Mass. Gen. L. ch. 6, § 172 et. seq. (1991), I would sue them for both actual and punitive damages. So they had to lie to get me to settle because one of my causes of action was disparate treatment under Title VII.

Proof of my disparate treatment claim would have gotten into, by name, who was registered, and why I had to register when my similarly situated white co-workers did not. Revelation of the registration scandal would have also exposed DLJ's cover-up of same. Albano Aff. ¶¶ 6, 8, 10, Green Aff. ¶ 8. Also see Amended Complaint ¶¶ 116-123, which states that DLJ failed to take appropriate action when they learned of the registration problem. DLJ manipulated and managed the SEC. Amended Complaint ¶ 123. Because of their failure to take appropriate action in a timely manner, all of DLJ's senior management faced, and indeed still face, permanent disbarment from the securities industry. A similar failure to take action caused Salomon Brothers' senior management to be disbarred, so clearly DLJ would lie, pay bribes, or do whatever, to avoid disbarment from their

multi-million dollar incomes. *In re Gutfreund*[8], *Strauss*[9], *and Meriweather*[10], Exchange Act Release No. 31554, 52 SEC Docket 2849, 1992 SEC LEXIS 2939 (December 3, 1992). When Albano atoned for the registration scandal with the NASD, he lied and said that the registration scandal was not intentional.

Defendant Hibsher lied to me and said that DLJ discovered the assault charges as part of the normal background check, and that the regulators brought the charges to DLJ's attention. Amended Complaint filed in 93 Civ. 3746 ¶¶ 139, 153 and Exhibit 9 of the Amended Complaint. See my April 18, 1994 Aff. at page 33, which states "Randy Britton calls Hibsher and confirms that it was the *regulators* who discovered the assault charges for DLJ."

Because how DLJ discovered this information was peculiarly within DLJ's knowledge, and I had Hibsher's word, an attorney, in writing, I believed him.

We settled on March 16, 1992. I signed a release, and was paid $150,000.

While doing research for my City of Boston Lawsuit (U.S. Supreme Court Docket Number 00-1568), I discovered that DLJ had breached the settlement agreement by filing a libelous per se Form U-5. I hastily filed a complaint within 5 days of my discovery of the breach to beat the one-year libel statute of limitations. While preparing my Amended Complaint, I checked to see what else DLJ had lied about, and I discovered that DLJ had lied about how they discovered the Massachusetts assault charges.

The remaining facts are detailed in the body of this petition as necessary to illustrate the argument.

B. Proceedings in the District Court

This action was commenced on June 2, 1993. An Amended Complaint was filed on September 30, 1993. The Defendants

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[8] Salomon's Chairman and CEO.

[9] Salomon's President.

[10] Salomon's Vice Chairman and Head of Trading.

moved to dismiss all claims except counts III (Libel) and IV (Breach of Contract), and those motions were granted on March 8, 1996, App. D, page 15a after Judge Wood adopted the majority of Magistrate Judge Lee's Report and Recommendation, App. E, page 25a. The Remaining DLJ Defendants then moved for summary Judgment on Counts III and IV. Their Motion for Summary Judgment was granted on February 20, 1998, App. B, page 4a after Judge Wood adopted Magistrate Judge Eaton's Report and Recommendation, App. C, page 7a. All of my substantive motions were denied, including my cross-motion for summary judgment and my Rule 56(f) motion. All of my motions for reconsideration and all of my post-judgment motions were denied as well.

C. District Court Jurisdiction

The District Court's Jurisdiction was based on diversity as provided by 28 U.S.C. § 1332 as well as the presence of a Federal Question as provided by 28 U.S.C. § 1331.

D. Proceedings in the Second Circuit

After Judge Wood entered judgment for the defendants on February 20, 1998, I filed a timely motion to reconsider which was denied. I then appealed to the Second Circuit, but the appeal was stayed so that I could file a Rule 60(b) motion in the District Court. Upon denial of the Rule 60(b) motion, I re-instated my appeal in the Second Circuit. The Second Circuit, relying on Second Circuit precedent, which is at odds with the Sixth, Seventh, and Ninth Circuits, ruled against me.

This Petition for a Writ of Certiorari follows to resolve the conflict between the Circuits, and the conflict between SEC Rule 17a-3 on the one hand, and state and federal anti-discrimination laws on the other.

REASONS FOR GRANTING THE WRIT

There are over 500,000 Registered Representatives and two thousand Broker-Dealers who will be directly affected by this Court's decision in this case. Title VII of the Civil Rights Act of 1964, as interpreted by the Ninth Circuit in *Gregory v. Litton Systems*, 316 F. Supp. 401, 403 (C.D. Ca. 1970) *affirmed* 472 F.2d 631 (9th Cir. 1972), prohibits an employer from asking an employee whether he or she has ever been arrested for anything that did not result in a conviction. Yet, SEC Rule 17a-3 requires employers, without any immunity from Title VII or state anti-discrimination lawsuits, to conduct the illegal arrest record inquiry. State anti-discrimination laws also prohibit the arrest record inquiry, and they provide for damages. The nation deserves an answer to this contradiction because an employer cannot simultaneously meet these conflicting federal and state mandates; securities industry employers are faced with conflicting directives that put them in violation of federal securities laws if they fail to make the illegal arrest record inquiry, and in violation of state and federal anti-discrimination laws if they do. With litigation being a certain result if the wrong minority is questioned, securities industry employers have an incentive not to hire minorities, especially those who may stand on their rights and sue. Hence a minority like myself, who has legal training, must either sleep on his rights or sue.

Whether the NYSE and the NASD are state actors or not determines whether the NYSE and the NASD must comply with constitutional strictures, including the prohibition on compelling a citizen to testify against himself. Following well-settled Second Circuit precedent, the Second Circuit held that the NYSE and the NASD are private entities. *United States v. Solomon*, 509 F.2d 863, 871 (2nd Cir. 1975) (NYSE is not a state actor) and *Desiderio v. NASD, Inc.*, 2 F. Supp. 2d 516, 519 (S.D.N.Y. 1998) ("NASD is not a state actor"). These cases, and all others so holding, were wrongly decided as they did not follow this Court's three-prong test[11] for finding state action by private parties. *Duffield v.*

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[11] Actually, if the conditions in either prong are met, state action is proved.

Robertson Stephens & Company, 144 F.3d 1182, 1200-1201 (9th Cir. 1998) *quoting Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777 (1982). Conflicting with Second Circuit precedent, the Ninth Circuit's *Duffield* opinion states that it is clear that the NYSE and the NASD have been state actors since at least 1983. If the NYSE must abide by the U.S. Constitution because of its state actor status, then Willsen and the NYSE violated my constitutional right against self incrimination when they sought to compel my written recitation of the "nature and circumstances surrounding my [non-conviction arrests/ charges]," without any offer of use immunity and before the statute of limitations had run on the underlying arrests/charges.

The Second Circuit has held that the NYSE and the NASD are not subject to the strictures of Title VII of the Civil Rights Act of 1964 when there is no direct employer-employee relationship. App. E, page 53a. Magistrate Judge Lee's Report stating this position was adopted by Judge Wood in her March 8, 1996 Order, App. D, page 15a and by the Second Circuit in its summary order, App. A, page 1a. However, the Ninth Circuit has recently held that Title VII is applicable when the right to employment is adversely affected by third parties, even in the absence of a direct employer-employee relationship. *The Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 580 (9th Cir. 2000)(en banc) *citing Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1340-41 (D.C.Cir.1973); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 202 (3d Cir.1994); *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 876-77 (6th Cir.1991); *Pardazi v. Cullman Med. Ctr.*, 838 F.2d 1155, 1156 (11th Cir.1988); and *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 722 (D.C.Cir.1978). As can be seen from the above citations, the Third, Sixth, Ninth, Eleventh, and the D.C. Circuits conflict with the Second Circuit's holding that only a direct employer can violate Title VII of the Civil Rights Act of 1964. All of the above cases have followed the "interference" model first articulated in *Sibley*. *The Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 580 n.4. (9th Cir. 2000)(en banc).

A third area of significant conflict between the Circuits lies in whether the mere filing of a Form U-5, without more, is a step in a NASD or a NYSE quasi-judicial proceeding. Judge Wood and the Second Circuit have taken the position that the mere filing of a Form U-5 is a step in the quasi-judicial process that cloaks <u>all</u> Form U-5's with absolute privilege. App. D, page 15a. The Second Circuit summarily adopted Judge Wood's position. App. A, page 1a. This position is at odds with both the Sixth and the Seventh Circuits. *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996)("The submission of a Form U-5, however, is not part of the NASD's quasi-judicial regulatory process.")

This Court should grant certiorari to clear up these conflicts between the Circuits and to resolve the catch-22 that pits Title VII, and its incorporated state anti-discrimination laws, against SEC Rule 17a-3. The EEOC determined that the securities industry's arrest record inquiry violated Title VII back in 1974 (See App. H, page 67a), but it has taken this long for someone to bring this issue to this Court's attention. Justice Ginsburg made an initial inquiry into this issue while she sat on the D. C. Circuit Court of Appeals, but Justice Ginsburg stopped short of a ruling because all of the plaintiffs were white and there were no allegations of racial discrimination (this is a prime example of the SEC's standing defense). *Association of Investment Brokers v. SEC*, 676 F.2d 857, 861 n.11 (D.C. Cir. 1982)("Petitioners do not complain of any adverse racial impact occasioned by the arrest question.") However, Justice Ginsburg did cite the *Gregory v. Litton Systems* decision from the Ninth Circuit for the proposition that the arrest record inquiry is illegal, if sued upon by a black.

If the mere filing of a Form U-5 is not a part of the NYSE's and the NASD's quasi-judicial proceedings, then the Form U-5 submitted in my case is not entitled to absolute privilege. There is overwhelming evidence to support malice so it will be easy to overcome DLJ's qualified immunity defense. If the constitutional restraints on state actors are applied to the NYSE and its rules and regulations, as is re-

quired by law, *Rust v. Sullivan*, 500 U.S. 173, 190 (1991), then its is clear that no NYSE rule or regulation required my disclosure of information that is protected by the Self Incrimination Clause of the Fifth Amendment.

Therefore, the Form U-5 which states that I was terminated for "inability to comply with NYSE regulations" is false because no constitutionally construed NYSE rule or regulation can abridge my right against self incrimination and force disclosure of the "nature and circumstances", over my objection.

Furthermore, if the NASD and the NYSE are state actors, then they could not legally compel my disclosure of the "nature and circumstances surrounding my [non-conviction arrests/charges]" because of the Self Incrimination Clause of the Fifth Amendment. If the NYSE and the NASD must comply with Title VII when dealing with the employees of their member firms, then neither the NYSE nor the NASD could legally require me to disclose non-conviction arrests and charges, especially in light of state anti-discrimination laws that explicitly outlaw such inquiries. If all of these questions and issues are favorably answered by this Court, then on remand to the Second Circuit, my libel claim will prevail against the defendants' absolute privilege and truth defenses. Because of the devastating blackballing effect that a false Form U-5 has on one's career in the securities industry, *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994), and the amount of money that could have been made, damages are always at least six-figured and sometimes in the eight figure range. *See E.g., Waite v. Dean Witter Reynolds, Inc.*, 1990 WL 463825 (Texas jury awarded over 23 Million dollars after the plaintiff's career was ruined by a Form U-5 falsely accusing the plaintiff of violating Exchange rules).

A. Form U-5 Filing Facts

DLJ does not claim that NYSE or NASD Rules and Regulations required DLJ to file the Form U-5. In fact, NASD Notice to Members 76-43 dated December 27, 1976, App. G,

page 65a, states that DLJ "should not" have filed a Form U-5 in my case because I had neither registered nor taken and passed the Series 7 Examination[12].

Although not itself approved by the SEC, NASD Notice to Members 76-43 is a valid federal rule because when it was issued on December 27, 1976, it was reasonably and fairly implied by an existing rule of the NASD, namely the 1976 version of NASD by-law Art IV § 3(a); therefore, it did not need to be specifically approved by the SEC. 17 C.F.R. 240.19b-4(c)(1). Once established as a NASD policy, however, NASD Notice to Members 76-43 is elevated to Federal NASD Rule status. 15 U.S.C. § 78c(a)(27) (defining "rule" to include "stated *policies*, practices, and interpretations"). 17 C.F.R. 240.19b-4 defines "stated *policies*, practices, and interpretations" to include

> any *statement* made generally available to the membership of . . . the self regulatory organization . . . that establishes or changes any standard, limit, or guideline with respect to: (i) the rights, obligations, or privileges of specified persons . . . or (ii) the meaning, administration, or enforcement of an existing rule.

As a federal rule, NASD Notice to Members 76-43 is just as binding on the parties and this Court as if it were a federal regulation or statute. *Queens Penn Corporation v. Mazzucco*, 19 Misc. 2d 567, 568, 187 N.Y.S.2d 313, 315 (Sup. Ct. 1959)(A Federal *rule* or regulation has the authority of statute and is as binding and effective as though enacted by Congress itself.")

NASD Notice to Members 76-43 states that a Form U-5 should not be submitted in my case, yet DLJ violated federal law when it filed the Form U-5 in my case. Because New York and Federal law is incorporated by reference into the

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[12] Once the SEC approves an NASD rule, the NASD has no power to amend its own rules without SEC approval. 15 U.S.C. § 78s(b)(1). The SEC has not approved a change to NASD Notice to Members 76-43.

settlement agreement, DLJ materially breached the settlement agreement and violated federal law when it filed a Form U-5 on me.

In any event, once DLJ filed a Form U-5, they incurred a legal duty to provide me with a copy. NYSE Rule 345.17. DLJ never gave me notice that they had filed a Form U-5 on me. Chalsty I Amended Complaint ¶ 41. DLJ filed the Form U-5 late[13]. NYSE Rule 345.17 requires Form U-5's to be filed within 30 days of the termination of a ***registered*** employee (see page 4), but DLJ did not file the Form U-5 until almost six months later. Because DLJ sneakily filed the Form U-5 late, I had no opportunity to challenge the statements made within the Form U-5 or to clear my good name. As DLJ conceded at oral argument before the Second Circuit, the Form U-5 did not commence an investigation or a quasi-judicial proceeding. No hearing was held, and I did not receive notice that DLJ had filed a Form U-5; therefore, none of the "procedural [due process] safeguards to deter defamation"[14] was in place.

B. Form U-5 Truth Facts

In her March 8, 1996 Order at page 4 Judge Wood erred when she wrote "DLJ appears to have described the actual reason for Britton's termination—failure to disclose past felony charges—at the highest possible level of generality, and in the least damaging way to Britton--as "inability to comply with NYSE regulations." This vague description is neither accurate nor true. At the time I filled out the Form U-4, I relied on Mass. Gen. L. ch. 151B, § 4 ¶ 9, N.Y. Exec. Law § 296[16], and N.Y. Crim. P. Law § 160.60 as justification for not having to disclose the information on the Form U-4. These state anti-discrimination laws prohibit the arrest re-

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[13] I was terminated on December 16, 1991, yet a Form U-5 was not filed until June 2, 1992. If a Form U-5 was due at all, it was due on January 15, 1992, which is 30 days after my termination and 61 days before DLJ and I settled.

[14] Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 8.2.4.2 (3rd ed. 1999).

cord inquiry, and they provide a remedy. In this litigation, I have also proven that the language on the Form U-4 did not require me to disclose any charges that were not brought by information or indictment. The Massachusetts assault charges were brought by criminal complaint, not by information or indictment, so by the plain language of the Form U-4's instruction, disclosure of the Massachusetts assault charges was not required on the Form U-4. I proved that disclosure was *not* required using a formal categorical syllogism that neither DLJ nor anyone else has refuted. See the Syllogism at page 29.

I also proved that the Form U-5 is false to the extent that it alleges I had to give a confession concerning the "nature and circumstances" surrounding two non-reportable misdemeanor charges. I cite and rely on *In re Ruggiero*, 263 A.D.2d 554, 693 N.Y.S.2d 266, 268-269 (1999) for the proposition that no NYSE or Securities Industry Rule or Regulation required me to give the requested details. No party or Judge has refuted or distinguished *In re Ruggiero*.

C. Form U-5 Privilege Facts

Judge Wood's ultimate error occurred when she wrote:

> statements on a Form U-5 are absolutely privileged under New York law because they are required by the NYSE acting in its capacity as a quasi-judicial administrative body; hence they cannot form the basis for a libel claim.

March 8, 1996 Order, page 15.

In this "one liner," Judge Wood speaks of Form U-5's in general; she does not address the distinguishing facts and circumstances surrounding the filing of the particular Form U-5 in my case: I was not registered, so by the plain language of NYSE Rule 345.17 (see page 4) and NASD Notice to

Members 76-43, no Form U-5 should have been filed[15]. There is no allegation in the record that the NYSE or the NASD ever acted in a quasi-judicial capacity on my Form U-5, and there is no basis for *assuming* that the NASD or the NYSE *always* acts in a quasi-judicial capacity on each and every Form U-5 it receives. These facts are fatal to DLJ's absolute privilege claim.

> A body that is empowered to act in a quasi-judicial capacity may not in fact be exercising such power at the time when defamatory statements are made. The statements will then not be absolutely protected, because they were not made in the proper procedural context. Such a slip can cost the defendants his or her immunity.

Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 8.2.4.2, page 8-32 (3rd ed. 1999).

It is undisputed that no one at the NYSE or the NASD required DLJ to file a Form U-5 on me. Judge Wood cites an unpublished Federal District Court opinion as support for her position that all Form U-5's are absolutely privileged, regardless of when and where they are filed: *Culver v. Merril Lynch, & Co.*, 1995 WL 422203 at *5, 94 Civ. 8124 (LBS) (S.D.N.Y. July 17, 1995). In so doing, Judge Wood stretched *Culver* beyond its facts and ignored contrary Second Circuit authority, *Fahnestock v. Waltman*, 935 F.2d 512, 516 (2nd Cir. 1991), which is based on the controlling New York Court of Appeals case, *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 5 (1978).

Moreover, the when and where of the filing, makes all the difference because if the statements are not made "in office," no absolute privilege can possibly attach. Hon. Robert D.

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[15] Under NYSE Information Memorandum 86-11, a Form RE-3, not a Form U-5, should be filed for *non-registered* employees terminated for cause. NYSE Info. Memo 86-11, 1986 NYSE Info. Memo LEXIS 43 (March 21, 1986). I was not terminated for cause; I was terminated for standing on my rights, in violation of state and federal anti-discrimination law.

Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 8.2.1, page 8-4 (3rd ed. 1999)(quoting Lord Mansfield: "since at least 1772, 'neither party, witness, counsel, jury or judge can be put to answer, civilly or criminally, for words [spoken or written] in office'"). But when Albano secretly signed the Form U-5, late, in violation of NASD Notice to Members 76-43, and without giving me notice, he was not acting as a party, witness, counsel, jury or judge in any quasi-judicial proceeding, so no absolute privilege can possibly attach.

It is also important to note that Judge Wood's Order, which the Second Circuit has adopted, assigns an absolute privilege to the Form U-5 solely because the statements are allegedly required by the NYSE and not because they were made in the course of a quasi-judicial proceeding because there was no quasi-judicial proceeding. Under New York law, a Form U-5, submitted pursuant to a legal duty, only rates a qualified privilege: the Second Circuit's *Fahnestock* opinion cites three New York Court of Appeals cases on point in support of its qualified privilege holding for Form U-5's. *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2nd Cir. 1991) citing *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 5 (1978); *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 509, 531 N.E.2d 288, 289, 534 N.Y.S.2d 656, 657 (1988) (per curiam), *Shapiro v. Health Ins. Plan of Greater New York*, 7 N.Y.2d 56, 60, 163 N.E.2d 333, 336, 194 N.Y.S.2d 509, 512-13 (1959). The Second Circuit panel that heard my case ignored these controlling precedents.

As will be seen in the argument section below, whether or not the filing of a Form U-5 is a step in the NASD's quasi-judicial process is the key question to be decided because it is clear that, under New York Law, a Form U-5 cannot gain absolute privilege status merely because it was submitted pursuant to a legal duty. Moreover, as will be seen, DLJ has failed to establish the elements of a quasi-judicial proceeding, so they are not entitled to an absolute privilege, in any event. Because of DLJ's malice and the settlement agreement, wherein DLJ contracted away its qualified privilege right to comment to others about the reason for my termination, DLJ has forfeited qualified privilege, as well.

ARGUMENT

I. A FORM U-5 SUBMITTED TO THE NASD IS NOT ENTITLED TO ABSOLUTE PRIVILEGE WHEN THE FORM U-5 DOES NOT COMMENCE AN INVESTIGATION OR A QUASI-JUDICIAL PROCEEDING, NEITHER THE NASD NOR THE NYSE HOLDS AN ADVERSARIAL HEARING, AND THE FORM U-5 RULES ARE NOT FOLLOWED.

Under the *Erie* Doctrine, this case is controlled by the decision of New York's highest Court in *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 5 (1978) and not by the appellate court's decision in *Herzfeld & Stern, Inc. v. Beck*, 175 A.D.2d 689, 572 N.Y.S.2d 683 (1991). *Herzfeld* is inapplicable unless at least an investigation occurs.

> Significantly, *Herzfeld* focused on the role that the Form U-5 played in causing the NYSE to initiate an investigation. The court reasoned that once an investigation had been launched the absolute privilege that attached to quasi-judicial proceedings applied not only to information supplied in connection with the exchange's investigation, but also to the Form U-5 that prompted the investigation. The decision leaves unclear the status of defamatory Form U-5 information that does not lead to an SRO investigation; however, the court's analysis -- under which the privileged status of the Form U-5 information derived from the resulting investigation -- suggests that such information may not enjoy absolute immunity.

Anne Wright, *Form U-5 Defamation*, 52 Wash. & Lee L. Rev. 1299, 1323-1324 (1995).

In short, if a Form U-5 causes the SRO's to investigate, then the absolute privilege of the investigation relates back to the Form U-5 that caused the investigation; however, when there is no investigation, there is no absolute privilege

to relate back. In both *Herzfeld*[16] and *Culver*[17], the Form U-5's triggered an SRO investigation, where, presumably, both Beck and Culver were given notice and the opportunity to engage in self-help[18] to clear their names.

When deciding *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994), the Seventh Circuit assumed that the NASD is acting in a quasi-judicial capacity when it "investigates or adjudicates or imposes sanctions with respect to suspected violations of the rules that it enforces", but the Seventh Circuit was quick to point out that "the submission of a U-5 form and its transmission (upon request) to members of the NASD are not stages in the association's quasi-judicial regulatory process." *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994). The Sixth Circuit agrees for the same reasons. *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996)("The submission of a Form U-5, however, is not part of the NASD's quasi-judicial regulatory process.") This is a genuine dispute between the Circuits that cannot be dismissed by simply saying that these Circuits were deciding the law in Illinois and Tennessee, respectively, because in both Illinous and Tennessee, these states are more likely to afford an absolute privilege to preliminary investigatory situations than is New York. For example, in both Illinois and Tennessee, complaints to a police officer or a District Attorney are accorded an absolute privilege, but in New York, only a qualified privilege is afforded to these preliminary reports. So the conflict between the Circuits cannot be explained by the differences in state law, because under a strict state law analysis, the results would be flip-

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[16] *Herzfeld & Stern, Inc. v. Beck*, 175 A.D.2d 689, 690, 572 N.Y.S.2d 683, 684 (App. Div. 1991)("the NYSE instituted an investigation into Beck's conduct.")

[17] *Culver v. Merril Lynch & Co.*, 1995 WL 422203, at *2, 1995 U.S. Dist. LEXIS 10017, at *4 (S.D.N.Y. July 17, 1995)("the NYSE commenced an investigation into Culver's activities.")

[18] "The first remedy of any victim of defamation is self-help--using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, 94 S. Ct. 2997, 3009 (1974).

analysis, the results would be flip-flopped: DLJ would only be entitled to a qualified privilege, and the Illinois and Tennessess broker-dealers would get an absolute privilege. Because that is not what the Courts found, it is clear that the critical question to be decided is whether the filing of a Form U-5, without more, is a step in the NASD's or the NYSE's quasi-judicial process. That is where the real conflict lies. The Seventh Circuit's analysis of the issue was far more thorough than the "one liner" that the District Court wrote and that the Second Circuit adopted in its Summary Order.

The following language from *Herzfeld & Stern, Inc. v. Beck*, 175 A.D.2d 689, 691, 572 N.Y.S.2d 683, 685 (1991) is causing the problem because it implies an early, yet blurry, starting line for the absolute privilege:

> Moreover, the absolute privilege attaches not only to the hearing stage, but to every step of the proceeding in question even if it is preliminary and/or investigatory and irrespective of whether formal charges are ever presented . . ..

As Judge Sack has noted, "the difficult cases are those involving communications made at the borders of the judicial process." Hon. Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 8.2.1.4, page 8-15 (3rd ed. 1999).

But the "every step of the proceeding" language in *Herzfeld* is not a quirk of New York Law; it is a partial quote which can be traced through the authorities cited in *Herzfeld* to Professor Prosser's Hornbook on Torts, as follows: *Herzfeld* cited *Meyers*[19] which cites *Stilsing*[20] which cites Prosser, Torts [4th ed], § 114, p 780. However, the "every step" language is clarified when Professor Prosser's "every step" language is shown in full context: "[t]he immunity extends to every step in the proceeding until final disposition, although it does not

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[19] *Meyers v. Amerada Hess Corporation*, 647 F. Supp 62, 65 n. 11 (S.D.N.Y. 1986).

[20] *Stilsing Electric, Inc. v. Joyce*, 113 A.D.2d 353, 356, N.Y.S.2d 999, 1002 (App. Div. 3rd Dept. 1985).

cover publications made before commencement or after termination." Prosser, Torts [4th ed], § 114, p 780. So it is clear that "publications made before commencement" are not entitled to absolute privilege under Prosser, or most importantly, under the New York Court of Appeal's case law. *Park Knoll Associates v. Schmidt*, 59 N.Y.2d 205, 211, 451 N.E.2d 182, 185, 464 N.Y.S.2d 424 (1983)("a witness is immune from suit for defamatory remarks pertinent to a judicial proceeding, *but not for those made before the proceeding commences*." [Emphasis Added.]) It is also clear that the only possible "office" Albano could have been deemed to have held is that of a witness in either an NASD or a NYSE investigation or quasi-judicial proceeding, because the parties in SRO proceedings are the SRO's and the subject of the investigation, not the broker-dealers, so *Park Knoll* is four square on point.

But when no quasi-judicial proceeding occurs at all, simply because the filing of the Form U-5 did not commence one, it is clear under *Park Knoll*, that absolute privilege is not available because such statements were obviously made "before" a proceeding commenced. To constitute a quasi-judicial proceeding, it must be (1) adversarial, (2) result in a determination that derives from the application of appropriate provisions in the law to the facts, and (3) be susceptible to judicial review. *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.2d 136, 141, 615 N.Y.S.2d 410, 413 (1994). DLJ has failed to establish the existence of a quasi-judicial proceeding because they failed to establish the existence of any prong of this three prong test. In *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.2d 136, 141, 615 N.Y.S.2d 410, 414 (1994), the term adversarial was defined as "contested." Clearly, when DLJ secretly filed the Form U-5, failed to give me notice, and no investigation or hearing occurred, there was no contest, so DLJ cannot establish the adversarial proceeding prong, and they cannot have an absolute privilege. No public policy is served when DLJ is given absolute privilege to assassinate my character with absolute impunity, and DLJ does not argue otherwise. However, before this Court can give DLJ an absolute privilege, it must find not only that the defamatory statements were made during a quasi-judicial

proceeding, but also that some public policy need is met. *Stilsing Electric, Inc. v. Joyce*, 113 A.D.2d 353, 356, N.Y.S.2d 999, 1002 (1985). The District Court's one liner also fails this test.

This is why there is a conflict with the Sixth and the Seventh Circuits. These Circuits have correctly held that although filing a Form U-5 can ***sometimes*** initiate a quasi-judicial proceeding, anything could do that, and it does not always do so. Therefore, it cannot be considered a step in the SRO's quasi-judicial regulatory process. If it were an initial step in the quasi-judicial process, then I would have received due process, including notice and the opportunity to be heard, and the quasi-judicial process would not have terminated before a ruling was made by the administrative equivalent of an Article III judge with appellate rights to the courts. Because this did not occur, it is clear that no quasi-judicial process was ever initiated and no absolute privilege could possibly attach. Although both the Sixth and Seventh Circuits, cite and rely on *Fahnestock*, the Second Circuit appears to have reversed itself without having gone through the necessary en banc process.

The Second Circuit's holding in the instant case also contradicts its prior holding in *Boice v. Unisys Corporation*, 50 F.3d 1145, 1150 (2nd Cir. 1995). In *Boice*, the Second Circuit determined that

> a person who volunteers statements to a state official, without a hearing, compulsion of subpoena, or any procedural safeguards, cannot avail himself of the "quasi-judicial proceeding" basis for absolute immunity, *Toker* held that the defendant was not absolutely immune.
>
> *Toker* explained that absolute immunity would be inappropriate for "communications which because of the absence of a hearing may often go unheard of, let alone challenged, by their subject."

That is precisely the facts of this case. The Form U-5 was, at best, optional; DLJ volunteered to file it, and no hearing was held, not even an investigation. The procedural safeguards of due process, where an adversarial hearing can be used to clear my name in a self-help fashion were never afforded to me.

In addition, because DLJ failed to follow the rules for Form U-5's, they forfeit the right to any privilege. *Artega v. State of New York*, 72 N.Y.2d 212, 220-221, 527 N.E.2d 1194, 1199, 532 N.Y.S.2d 57 (1988)("unlawful actions of employe[r]s taken beyond their authority or in violation of the governing rules and regulations" . . . "would not receive immunity"). DLJ filed the Form U-5 in violation of NASD Notice to Members 76-43. DLJ filed the Form U-5 late, and they failed to give me a copy; thereby denying me notice that a Form U-5 had been filed, so I had no opportunity to challenge its content. Giving a copy of the Form U-5 to the subject of the Form U-5 is an important due process safeguard, which when violated, destroyed DLJ's privilege. To avoid the injustice I have suffered, NASD Rules have been re-written to require that the employee receive a copy of the Form U-5, with the opportunity to comment, *before* the NASD will accept a Form U-5 for filing.

> To clothe with absolute immunity communications made to a body acting in other than a quasi-judicial capacity -- communications which because of the absence of a hearing may often go unheard of, let alone challenged, by their subject -- would provide an unchecked vehicle for silent but effective character assassination.

Toker v. Pollak, 44 N.Y.2d 211, 222-223, 376 N.E.2d 163, 168-169, 405 N.Y.S.2d 1 (1978).

It is clear that the New York Court of Appeals, the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit would have decided this case differently.

II. THE FORM U-5 IS NOT TRUE.

DLJ has not been able to prove the truth of the Form U-5, given (1) my syllogism at page 29, (2) my reliance on *In re Ruggiero*, and (3) my reliance on the S
elf Incrimination Clause of the Fifth Amendment to justify refusing to give a written explanation as to the "nature and circumstances surrounding" my misdemeanor arrests and charges. DLJ has been unable to cite the NYSE regulation, with which I am allegedly unable to comply.

I rely on *In re Ruggiero* for the proposition that no SEC, no NYSE, and no NASD Rule or Regulation required me to give this explanation to Willsen and for the proposition that New York's Human Rights law prevents the inquiry altogether. I rely on *Duffield*[21] for the proposition that the NYSE and the NASD are state actors who must respect the Self Incrimination Clause, when performing their regulatory functions. *Duffield* conflicts with the Second Circuit's holdings in *Solomon*[22] and *Desiderio*[23], so certiorari is appropriate to determine whether this Court will adopt or reject the state actor holding in *Duffield*.

The following formal syllogism proves that criminal complaints are not required to be reported on the Form U-4:

> I. All information required to be disclosed on Page 3 of the Form U-4 is available to the public through the NASD's Public Disclosure Program.[24]

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[21] *Duffield v. Robertson Stephens & Company*, 144 F.3d 1182, 1200-1201 (9th Cir 1998)(It is clear beyond doubt that after the SEC approved SEC Rule 15b7-1 on or about June 10, 1993, the NYSE and the NASD became state actors)

[22] *United States v. Solomon*, 509 F.2d 863, 871 (2nd Cir. 1975).

[23] *Desiderio v. NASD*, 191 F.3d 198, 207 (2nd Cir. 1999).

[24] *Order Granting Approval of Changes to the NASD's Public Disclosure Program*, Exchange Act Release No. 39562, 66 SEC Docket 722, 723, 1998 SEC LEXIS 87, at *5, (January 20, 1998)("the proposed rule change allows the NASD to release all information on any questions on page 3 (Question 22) of the amended Form U-4 . . . as approved by the commission in July 1996.").

II. No Criminal Complaints are available to the Public through the NASD's Public Disclosure Program.[25]

III. Therefore, No Criminal Complaints are required to be disclosed on Page 3 of the Form U-4.

CONCLUSION

The petition for a writ of certiorari should be granted because there is something rotten on Wall Street that the Second Circuit refuses to clean up.

Respectfully submitted,

RANDY BRITTON, MBA, CPA
3214 Lexington Ridge Drive
Lexington, MA 02421-8309
(781) 861-9297

Dated: February 26, 2001

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[25] *Order Granting Approval of Changes to the NASD's Public Disclosure Program*, Exchange Act Release No. 39562, 66 SEC Docket 722, 723, 1998 SEC LEXIS 87, at *4-*5 (January 20, 1998)("Under the NASD's Public Disclosure Program, the NASD" only releases "criminal indictments, informations or convictions . . . ."); *NASD Regulation's Public Disclosure Program Brochure, WWW.NASDR.COM/2004.htm*, page 3 (1997)(Only "Criminal convictions, informations and indictments" are available.)

APPENDIX

APPENDIX A - SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED, AND FILED ON JUNE 15, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No .99-7333, 99-9376

RANDY BRITTON, CAROLYN BRITTON

Plaintiff-Appellants,

-vs-

JOHN S. CHALSTY, et. al.,

Defendant-Appellees.

Before
Winter, Chief Judge
Sack, Circuit Judge,
and Hodges, District Judge.

Entered: June 15, 2000

* * *

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Randy and Carolyn Britton appeal from Judge Woods' orders dismissing their claims for fraud, breach of contract, libel, rescission, infliction of emotional distress, loss of consortium, unlawful discrimination, and unlawful investigation. Appellants also appeal from the district court's dis-

missal of their claim seeking to invalidate a Securities and Exchange Commission ("SEC") regulation and parallel regulations promulgated by various self-regulatory agencies created pursuant to SEC rules. Finally, appellants appeal from district court orders denying their motions for additional discovery, reconsideration, and to vacate the judgment.

We affirm the orders dismissing appellants' claims for substantially the reasons stated by the district court and by Magistrate Judge Eaton in his September 13, 1996 Report and Recommendation. See Britton v. Chalsty, No. 94 Civ. 1118 (S.D.N .Y. Aug. 4, 1999); Britton v. Chalsty, No. 93 Cv. 3746 (S.D.N.Y. Mar. 8, 1996); Britton v. Chalsty, No. 93 Cv. 3746 (S.D.N.Y. Sept. 13, 1996).

We review the other challenged orders for abuse of discretion. See DG Creditor Corp. v. Dabah (In re DG Acquisition Corp.), 151 F.3d 75, 79 (2d Cir.1998) ("[T]rial court enjoys wide discretion in its handling of pre-trial discovery, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion." (internal quotation marks omitted)); Branum v. Clark, 927 F.2d 698, 704 (2d Cir.1991) (order denying motion to vacate judgment); McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir.1983) (order denying motion for reconsideration). The district court acted well within its discretion in denying appellants' motion for additional discovery because it was made approximately two months after discovery was scheduled to have been completed. The district court also did not abuse its discretion in denying appellants' several motions seeking reconsideration or to vacate the judgment because appellant did not demonstrate that the court overlooked controlling legal authority or facts that were before it, but was merely seeking to reargue previously adjudicated issues. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir.1995) (noting that court should grant reconsideration motion only

where "moving party can point to controlling decisions or data that the court overlooked"); Fleming v. New York Univ., 865 F.2d 478, 484 (2d Cir.1989) (motion to vacate judgment "cannot serve as an attempt to relitigate the merits").

We therefore affirm.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk

s/ Lucille Carr

Date: 6/15/00

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED ON FEBRUARY 20, 1998

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 93 Civ. 3746 (KMW) (DFE).

RANDY BRITTON and CAROLYN BRITTON,

Plaintiffs,

v.

JOHN S. CHALSTY, et. al.,

Defendants.

ORDER

* * *

WOOD, *District Judge:*

I. Discussion

In a Report and Recommendation dated September 13, 1996 (the "Report"), Magistrate Judge Douglas F. Eaton recommended that I grant Donaldson, Lufkin & Jenrette Securities Corporation ("DLJ"), and its employees Michael A. Boyd, Robert J. Albano, and RoseMary Green's (collectively referred to herein as the "remaining DLJ defendants) motion for summary judgment on plaintiffs, libel claim (Count III of the Amended Complaint) and breach of contract claim (Count IV of the Amended Complaint). Plaintiffs have filed timely objections to the Report, and the remaining DLJ defendants have filed a timely response to those objections. Pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b) (1) (B) , I have review de novo those aspects of the Report to which plaintiffs object. After a de novo

review the recommendations in the Report, and consideration of plaintiffs' objections to the Report and the remaining DLJ defendants response to those objections, I adopt the recommendations of the Report.

Plaintiffs, principal objection to the treatment of their libel claim in the Report is that is that DLJ was not required to file the Form U-5 with the New York Stock Exchange (the "NYSE") on Randy Britton following his employment with DLJ and therefore that the statements in the. Form U-5 are subject to an absolute privilege. Magistrate Judge Eaton considered and properly rejected this argument in the Report. (See Report at 2.) This objection is answered by the reasoning in the Report, (see Report at 1-2), and the law stated by the remaining DLJ defendants. (See Remaining DLJ Defendants' Memo of 6/9/97 at 4-7.) Because there is not a genuine issue of material fact, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50 (1986), as to plaintiffs' libel claim the Court adopts the recommendation in the Report that the remaining DLJ defendants' motion for summary judgment be granted as to plaintiffs' libel claim.

Plaintiffs' principal and other objections to the Report's treatment of their breach of contract claim are also without merit. Plaintiffs principal objection is that the Report misreads paragraph 9 of the settlement agreement. Paragraph 9 provides:

> 9. In the event that inquiries are made of DLJ concerning the circumstances surrounding the termination of Britton's employment or seeking an evaluation of Britton's performance while in the employ of DLJ, DLJ shall refer all such inquiries to its Human Resources Department, which shall merely verify the dates of Britton's employment and his title.

Appendix B

Magistrate Judge Eaton construed "inquiries" in this provision not to include the information contained in a Form U-5. I agree with this construction of the settlement agreement. Because there is no genuine issue of material fact as to plaintiffs' breach of contract claim, for the reasons stated in the Report, I grant the remaining DLJ defendants' motion for summary judgment on plaintiffs' breach of contract claim.

II. Conclusion

For the reasons set for above and those in the Report, I grant the remaining DLJ defendants' motion for summary judgment as to plaintiffs' libel and breach of contract claims. Because I have previously dismissed all of plaintiffs' other claims with prejudice, (see Order of 3/8/96 at 11) , I direct the Clerk of Court to close this case. Any remaining motions are moot.

SO ORDERED.

New York, New York
February 20, 1998

s/ Kimba M. Wood
KIMBA M. WOOD
United States District Judge

APPENDIX C - REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED ON SEPTEMBER 13, 1996

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 93 Civ. 3746 (KMW) (DFE).

RANDY BRITTON and CAROLYN BRITTON,

Plaintiffs,

v.

JOHN S. CHALSTY, et. al.,

Defendants.

**REPORT AND RECOMMENDATION
TO JUDGE WOOD**

* * *

DOUGLAS F. EATON, United States Magistrate Judge.

Judge Wood's 3/8/96 Order dismissed all of Randy Britton's claims with prejudice except for the claims of libel (Count III) and breach of contract (Count IV). She gave him 30 days to seek to amend his complaint, but he did not do so.

On 1/11/96 a motion for summary judgment on Counts III and IV was filed by the four remaining DLJ defendants, namely Donaldson, Lufkin & Jenrette Securities Corporation (DLJ) and its employees Michael A. Boyd, Robert J. Albano and RoseMary Green. On 3/14/96 Britton submitted opposing papers and a cross motion for summary judgment. Reply papers were served on 3/28/96 and surreply papers on 4/4/96.

Appendix C

1. The Libel Claim (9/30/93 Amended Complaint, especially ¶194-¶1100 and ¶1133)

In her 3/8/96 Order, Judge Wood dismissed this same libel claim as to the defendants New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc. because "statements made on a Form U-5 are absolutely privileged." Judge Wood's rationale also applies to the remaining DLJ defendants, and therefore the libel claim must be dismissed as to them.

Judge Wood noted that "DLJ . . . completed the NYSE Form U-5, as it was required by the NYSE to do." 3/8/96 Order at 5. Britton retorts that a U-5 was not legally required in the circumstances of his case, and he relies on a 1976 NASD notice. (NASD Notice to Members 76-43, see Britton's 3/14/96 Memorandum at 5-9 and Exhibit 1) A complete answer to Britton's argument is contained in the 3/28/96 affidavit of Ellen Badler Cook of the NASD. She explains that the 1976 NASD notice became superseded by 1982. She also specifically rebuts Britton's contention that "after 180 days, the NASD purges applications that are not actively pursued"; she concludes:

> 8 . . . . A "purge" of a Form U-4 registration request by NASD does not, however, effect or terminate the employment relationship on the CRD [Central Registration Depository] and does not eliminate NASD's requirement that a member firm file a Form U-5 to terminate the employment of record.

Britton's 4/4/96 Reply Memorandum at 20 lamely responds that "Badler-Cook does not have the authority to make NASD Rules nor set NASD policy." He does not raise any doubt that she would have been the logical person for DLJ to consult in early 1992, as DLJ says it did. (See

Appendix C

1/11/96 aff. of RoseMary Green at 8-9 and 3/28/96 aff. of Ellen Badler Cook at 2)

Accordingly, absolute privilege bars the libel claim. In addition, the libel claim should be dismissed because no rational jury could conclude that the U-5 statement was false.

Paragraph 95 of the Amended Complaint correctly notes that DLJ's statement on the U-5 indicates that the reason Britton **left DIJ was** "OTH[ER]; Inability to comply with NYSE regulations." Britton contends that a prospective employer would read this as a statement that DIJ terminated Britton because of Britton's "inability to comply with NYSE regulations." A rational jury could so find, but it could not find that the statement was false. On the issue of falsity, the crux of Britton's claim is in Paragraph 99 of the Amended Complaint:

> 99. BRITTON has stated a willingness and demonstrated an ability to comply with every law, regulation, or rule governing his employment with DLJ since Day 1. This is what BRITTON told LEE on BRITTON's first day of work as memorialized in BRITTON's 6 November 1991 letter to WILLSEN through LEE ("6 Nov 91 Letter") . This letter and its attachments are at Exhibit 12 which is incorporated herein by reference.

On the contrary, Britton's 11/6/91 letter shows the truth of the 6/3/92 U-5 statement. Britton's letter begins as follows:

> **I flatly refuse** to furnish the information and/or documentation requested in Mr. Willsen's letters to Tom Lee and/or in Mr. Rigg's memorandum to me. (These documents are attached.)

Appendix C

> Neither the New York Stock Exchange nor Donaldson, Lufkin & Jenrette, Inc. has the authority to legally compel my disclosure of this information. . . . You have hardened my resolve to defy both the NYSE and DLJ.

In a later part of the second paragraph, Britton alludes to his "desire" to comply, but only if he becomes personally convinced that the NYSE has the legal authority to compel him to comply. He was not so convinced by the time he was terminated, and therefore it was accurate to say that he was unable to comply.

Britton's written statements of defiance occurred both before and after his 12/16/91 firing. But now, in an attempt to prove that the U-5 was false, he claims that before he was fired he orally agreed to give Albano a written statement about his past felony charges. See his 3/14/96 Memorandum at 32 and his 4/4/96 Reply Memorandum at 30-31, where he asserts:

> As this matter wore on, Britton agreed to give Albano a written statement as well as copies of any court documents that existed. Britton notified Albano of this decision well before his [12/16/91] termination. Britton made this assertion way back in the January 10, 1992 letter to Harcum and Marino on page 5, end of paragraph 5.

The 1/10/92 letter (Exhibit 7 to the Amended Complaint) is 16 pages long, and is Britton's detailed account of what happened before and after he was fired. The portion cited by Britton does not say that he agreed to give a written statement; at most it implies that he might have given such a statement if the NYSE had met his preconditions about privacy:

Appendix C

> In addition, Bob Albano was supposed to be finding out what security would be accorded my document if I turned it over to the NYSE, and in particular, whether the Privacy Act of 1974 applied. While waiting for these responses, I was fired. [Exh. 7 at 5]

Other portions of the same document would preclude any rational jury from finding that Britton agreed to give Albano whatever information the regulators wanted:

> On or about 5/22/91 1 complained to Gerald Riggs. . . . He responded by asking me illegal questions about what it was I thought would show up on the background check. . . . I only told him about arrests or circumstances under which I was fingerprinted. Therefore I did not list the assault w/a dangerous weapon charge because I was not arrested or fingerprinted. [Exh. 7 at 9]
>
> * * *
>
> On 12/16/91 I was fired and asked if a newly discovered assault with a dangerous weapon charge was true which had been favorably closed in 1990. This was an illegal question. [Exh. 7 at 14]

The quoted portions of Britton's document confirm that he concealed the assault charge until DLJ discovered it and fired him. His 3/14/96 Memorandum at 43 says:

> In the Boston lawsuit, Britton asserts, as he does here, that the discovery of the previously undisclosed Massachusetts assault charges was the catalyst for his termination from DLJ.

For all the reasons stated above, I recommend that the Court grant summary judgment in favor of the remaining DLJ defendants on the libel claim.

Appendix C

2. The Breach of Contract Claim (9/30/93 Amended Complaint, ¶1134-¶1135)

Paragraph 135 of the Amended Complaint states, in its entirety: "By submitting a Form U-5, DLJ breached paragraph 9 of the Agreement." The Agreement is annexed as part of Exhibit 1 to the Amended Complaint. Paragraph 9 reads as follows:

> 9. In the event that inquiries are made of DLJ concerning the circumstances surrounding the termination of Britton's employment or seeking an evaluation of Britton's employment or seeking an evaluation of Britton's performance while in the employ of DLJ, DLJ shall refer all such inquiries to its Human Resources Department, which shall merely verify the dates of Britton's employment and his title.

Judge Wood's 3/8/96 Order at 4-5 stated:

> Moreover, it seems clear that DLJ and Britton could not have legally agreed that DLJ would complete the Form U-5 in any manner other than to state accurately the reasons for Britton's termination . . . . [A]n answer giving only Britton's name, title and dates of employment on the Form U-5 . . . (1) would not have been responsive to the question posed by the form, and (2) would have thwarted the form's goal of furthering NYSE's role in monitoring its members' compliance with relevant regulations.
>
> * * *
>
> . . . Britton has failed to explain how DLJ could have done more than it did to prevent Britton's employment chances from being adversely affected, and yet still have truthfully responded to the Form U-51s question.

Britton does not respond to these points, except to reiterate his assertion that DLJ was not required to file a Form U5. See his 3/14/96 Memorandum at 129-130. That assertion is incorrect, for the reasons set forth above in discussing the libel claim.

A Form U-5 is not an "inquiry. It is a requirement imposed by the NASD and the NYSE on member firms. The member firm cannot comply with that requirement by merely giving the employee's name, title and dates of employment. Accordingly, it is clear that Paragraph 9's discussion of "inquiries" does not cover a Form U-5.

Finally, I note that Paragraph 1 of the Amended Complaint states that DLJ's attorney said that DLJ "was willing to reword the Form U-5" but that "BRITTON finds DLJ's offer unacceptable." It is undisputed that the Form U-5 will not be available to any employer unless and until Britton makes an application for employment with a firm that is an NYSE member.

For all the reasons stated above, I recommend that the Court grant summary judgment in favor of the remaining DLJ, defendants on the breach of contract claim.

Pursuant to 28 U.S.C. 636 (b)(1)(B), any party may object to this recommendation within 10 business days from September 13, 1996 by filing written objections with the Clerk of the U.S. District Court and mailing copies (a) to the opposing party, (b) to the Hon. Kimba M. Wood, U.S.D.J. at Room 1610, 500 Pearl Street, New York, NY 10007, and (c) to the chambers of the undersigned. Failure to file objections within 10 business days will preclude appellate review. See 28 U.S.C. 636(b)(1)(B); Rules 6(a), 6(e) and 72(b), Federal Rules of Civil Procedure; Thomas v Arn, 474 U.S. 140 (1985); Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir.

1988). Any request for an extension of time must be addressed to Judge Wood. Also, if Britton wants to file more than 50 pages of objections, I strongly urge him to seek prior approval from Judge Wood.

/s Douglas F. Eaton
DOUGLAS F. EATON
United States Magistrate Judge

Dated: New York, New York
September 13, 1996

APPENDIX D – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED ON MARCH 8, 1996

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 93 Civ. 3746 (KMW) (BAL).

RANDY BRITTON and CAROLYN BRITTON,

Plaintiffs,

v.

JOHN S. CHALSTY, et. al.,

Defendants.

ORDER

* * *

WOOD, *District Judge:*

On September 7, 1995, I received a Report and Recommendation ("Report") in this action from Magistrate Judge Barbara A. Lee, recommending that I grant defendants' motion to dismiss the majority of the claims asserted by pro se plaintiffs Randy Britton ("Britton") and Carolyn Britton in their complaint.

On October 10, 1995, I received belated objections (the "Objections") to the Report from Britton. I have considered Britton's Objections, despite the fact that they were untimely filed. I subsequently received multiple responses to the objections from different defendants, which I have also considered.

I review the Report de novo under 28 U.S.C. S 636(b).

Appendix D

I. Background

This pro se action arises out of a decision by the brokerage firm Donaldson, Lufkin and Jenrette Securities Corporation ("DLJ") to terminate Britton's employment because, inter alia, Britton failed to disclose, as New York Stock Exchange ("NYSE") regulations required, the existence of two Massachusetts felony charges of which he had been acquitted.

On March 16, 1992, Britton and DLJ entered into a settlement agreement under which Britton (1) released all of his claims against DLJ, the NYSE, and their employees and agents, relating to his discharge by DLJ and his application for NYSE registration; and (2) withdrew a complaint that he had filed before a Massachusetts agency, alleging that DLJ had conducted an illegal investigation by which it obtained information about one of the two Massachusetts felony charges.

In exchange, under the settlement agreement, DLJ gave to Britton (1) a $150,000 payment; and (2) a promise that DLJ would respond to future inquiries as to Britton's employment by simply giving out Britton's title and the dates he was employed -- rather than by providing the reason for Britton's termination.

On June 3, 1993, Britton filed this action. Britton alleges that the settlement agreement is unenforceable because (1) DLJ materially breached it, and (2) DLJ fraudulently induced him to sign it.

Britton therefore brings tort claims related to his discharge and his NYSE registration against DLJ; several of its corporate affiliates, employees, agents and attorneys; and the NYSE and one of its employees. Britton also brings several other claims against these defendants based on their post-settlement conduct, which I detail below. Finally, with

regard to some of his claims, Britton names as additional defendants the Securities Exchange Commission ("SEC") and the National Association of Securities Dealers ("NASD").

II. Analysis

A. Whether the Settlement Agreement Barring Some of Britton's claims Is Binding or Subject to Rescission

Britton provides two reasons that rescission of the settlement agreement is merited, which I consider in turn.

First, Britton contends that rescission is required because DLJ materially breached its obligations under the agreement. Specifically, Britton contends that DLJ broke its promise not to give a reason for Britton's termination in response to inquiries, when, on June 3, 1992, DLJ reported to the NYSE -- on a Form U-5 that it was required to complete -- that Britton had been terminated due to "inability to comply with NYSE regulations."

Yet it is not clear that DLJ's filing of the Form U-5 constituted a breach of the parties' settlement agreement at all. It is undisputed that the parties had discussed, during settlement negotiations, what DLJ would say on the Form U-5, and that they had failed to reach agreement on this point. Accordingly, the agreement did not stipulate precisely what DLJ would state on its Form U-5. In addition, it is unclear whether DLJ's response to the NYSE's requirement that it file a Form U-5 is the type of response to an inquiry that the parties' settlement agreement contemplated.

Moreover, it seems clear that DLJ and Britton could not have legally agreed that DLJ would complete the Form U-5 in any manner other than to state accurately the reasons for Britton's termination. DLJ appears to have described the

actual reason for Britton's termination -- failure to disclose past felony charges -- at the highest possible level of generality, and in the least damaging way to Britton -- as "inability to comply with NYSE regulations." Indeed, by failing to specify the regulations with which Britton failed to comply, DLJ described the reason for Britton's termination as vaguely as possible. In contrast, an answer giving only Britton's name, title, and dates of employment on the Form U-5 -- as DLJ had promised to do in response to employers' inquiries -- (1) would not have been responsive to the question posed by the form, and (2) would have thwarted the form's goal of furthering NYSE's role in monitoring its members' compliance with relevant regulations.

Second, even assuming arquendo that DLJ's disclosure on the Form U-5 constituted a breach of the agreement, I conclude, as did Magistrate Judge Lee, that the breach was not so material as to (1) defeat the parties' purpose in entering into the agreement; and therefore (2) justify rescission of the agreement under New York law.

By setting out, in the settlement agreement, that DLJ would respond with only minimal information to any future inquiries about Britton's employment, the parties apparently intended to ensure that DLJ's comments would be truthful, and yet would not adversely affect future employers' decisions as to whether to hire Britton.

Britton has not alleged that, in responding to inquiries from possible employers, DLJ has ever departed from the settlement agreement's scripted response, except in the single instance when it completed the NYSE Form U-5, as it was required by the NYSE to do. Moreover, Britton has not alleged that in any instance DLJ's statement on the Form U-5 has adversely affected his chances for employment with a

particular employer.[1] Finally, Britton has failed to explain how DLJ could have done more than it did to prevent Britton's employment chances from being adversely affected, and yet still have truthfully responded to the Form U-5's question.[2]

For these reasons, I adopt Magistrate Judge Lee's conclusion that DLJ's alleged breach of the settlement agreement would, at most, justify only the award of contract damages that Britton seeks from DLJ, not a wholesale rescission of the agreement.

Second, Britton contends that he is entitled to rescission of the settlement agreement, because his consent to the agreement was fraudulently induced. Specifically, Britton contends that DLJ fraudulently induced him to sign the agreement by falsely informing him that it had discovered the existence of the charges against him through standard procedures, not through illegal means.

As noted above, in the settlement agreement, Britton specifically waived his right to file a Massachusetts administrative complaint alleging that DLJ had discovered one of the felony charges against him through an illegal investigation. In her Report, Magistrate Judge Lee recommended that I

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[1] In addition, DLJ contends, without dispute, that under applicable NYSE regulations, (1) the Form U-5 will not be available to any employer until Britton makes an application for employment with a firm that is an NYSE member; and (2) Britton will be able to explain to a prospective employer his version of the events leading up to his termination.

[2] In addition, if Britton did (1) demonstrate breach of contract, and (2) suggest a way in which DLJ could rewrite the Form U-5 to comply with applicable law and cause less alleged harm to Britton's employment prospects, Britton could request from the court specific performance on the contract, in the form of an order directing DLJ to resubmit a rewritten form to the NYSE.

hold that Britton's fraudulent inducement claim fails because it conflicts with Britton's prior waiver of the right to file the Massachusetts administrative charge.

That is, Magistrate Judge Lee reasoned that because (1) Britton must have been familiar at the time of settlement with the facts underlying his Massachusetts administrative charge against DLJ for its allegedly illegal investigation, (2) Britton could not have been misled by DLJ's representations, in settlement negotiations, that the investigation it had conducted was in fact legal.

I do not find a direct conflict between Britton's agreement to waive his right to bring the Massachusetts administrative charge, and his fraudulent inducement claim. However, like Magistrate Judge Lee, I note that, under New York law, a party who is aware of a fact prior to settlement cannot use that fact as a basis for a later claim that the settlement was fraudulently induced. Thus, Britton's waiver of his right to file the administrative charge could be consistent with his fraudulent inducement claim only if, after the settlement agreement was executed, Britton discovered dramatic new information that suggested -- much more strongly than had the information available to Britton prior to settlement -- that DLJ had in fact conducted an illegal investigation of Britton. There is no indication here that Britton received dramatic new information to this effect.

Moreover, even had Britton received dramatic new information as to the circumstances of DLJIs investigation of the charges against him, that would have materially altered his decision to enter into the settlement agreement, DLJ points out in its response to Britton's Objections that, in the settlement agreement, Britton waived his right even to unknown claims and damages related to his claims against DLJ and NYSE, arising out of (1) his employment with, and

discharge by, DLJ; and (2) his application for NYSE registration.

As a consequence, I dismiss Britton's fraudulent inducement claim; hold that the claim provides no basis for rescission of the settlement agreement; and deem the settlement agreement fully enforceable, to bar those of Britton's claims that come within its scope.

B. Whether The Claims Not Barred By-the Settlement Agreement Should Also Be Dismissed

Because I hold that the settlement agreement is enforceable against Britton, I go on to consider only Britton's claims (1) against DLJ, the NYSE, and their employees and agents, based on conduct occurring after March 16, 1992, when the parties entered into the settlement agreement; and (2) against the remaining defendants in this action, the SEC and NASD.

I first consider Britton's post-settlement claims against DLJ, the NYSE, and their employees and agents. As the Report notes, defendants have not moved to dismiss Britton's claims against DLJ for libel and breach of contract, based on DLJ's filing of the Form U-5 subsequent to the settlement agreement.[3]

However, defendants have moved to dismiss the libel claims against individual DLJ employees, because the claims fail to detail what conduct by individual employees allegedly gives rise to the libel claims. Accordingly, I dis-

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[3] Like Magistrate Judge Lee, I note that Britton's argument that DLJ did not promptly tell him when the Form U-5 was filed does not state an independent cause of action, but rather, as Britton concedes, is possibly relevant only to the question when the statute of limitations began to run on Britton's related claims.

miss these claims, with leave to replead.[4] I note that, if Britton chooses to replead these claims, he must specifically allege what particular conduct by each individual defendant associated with DLJ is alleged to give rise to the libel claim asserted.

Magistrate Judge Lee recommended that I dismiss Britton's libel claim against the NYSE based on the NYSE's requirement, review, and possible future promulgation, of the information on the Form U-5. However, statements on a Form U-5 are absolutely privileged under New York law because they are required by the NYSE acting in its capacity as a quasi-judicial administrative body; hence, they cannot form the basis for a libel claim. See Culver v. Merrill Lynch & Co., 1995 WL 422203, 94 Civ. 8124 (LBS) (S.D.N.Y. July 17, 1995), at *5. I accordingly dismiss the libel claim against the NYSE.

I now turn to Britton's claims against the non-settling defendants, the SEC and NASD. First, I hold that, like Britton's libel claim against the NYSE, Britton's libel claim against NASD, based on the filing of the Form U-5, must be dismissed because, under New York law, statements made on a Form U-5 are absolutely privileged.

Second, Britton seeks a declaratory judgment against the SEC and NASD to the effect that their rule that applicants for jobs as brokerage employees must disclose criminal charges that do not result in convictions is invalid because it constitutes race discrimination in violation of Title VII. Specifically, Britton argues that the rule has a disparate im-

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[4] The Report is ambiguous as to whether it recommends that these claims be dismissed with leave to replead. I dismiss them with leave to replead, in part because pro se plaintiffs like Britton are, as a rule, allowed leave freely to amend their complaints.

pact on, and therefore constitutes discrimination against, black job applicants who, Britton contends, are disproportionately subjected to harassment by being prosecuted on charges that ultimately turn out to be unsubstantiated.

Magistrate Judge Lee recommended that I dismiss Britton's request for a declaratory judgment as to the invalidity of the SEC rule, on the ground that this court lacks subject matter jurisdiction. It is undisputed that Britton has failed to exhaust his administrative remedies with the SEC. See 15 U.S.C. S 78y(b)(1) (after SEC's decision as to whether to amend rule, petitioner may appeal to Court of Appeals of the relevant circuit). Britton contends that exhaustion would be futile, but does not explain why he believes this is so. Accordingly, I adopt the Magistrate Judge's recommendation, and dismiss Britton's Title VII claims, without prejudice to Britton's ability to pursue these claims before the SEC and, if he chooses, to appeal them to a Court of Appeals in the proper judicial circuit.[5]

Finally, Magistrate Judge Lee recommends that I conclude that Britton has not alleged any other cognizable theory on which liability could be predicated, with respect to any additional claims against both the settling and non-settling defendants. I adopt this conclusion, and accordingly dismiss all of Britton's other claims, not discussed above.

I note, however, that as the Magistrate Judge pointed out, it is at times difficult to ascertain exactly what causes of action Britton, who is proceeding pro se, is attempting to assert. Pro se plaintiffs are accorded the opportunity to freely

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[5] Because I lack subject matter jurisdiction over the Title VII claims, I deem it inappropriate to dismiss them with prejudice, as the Magistrate Judge recommended, based on other possible pleading deficiencies, and I express no opinion as to their merit.

amend their complaints. Accordingly, I hold that (1) Britton may within thirty days timely seek to amend his complaint, if he can come forward with a specific legal theory under which the current defendants may be found liable, or under which new defendants may be added; and that (2) if Britton does seek to amend his complaint, the court will construe this dismissal of his prior claims narrowly, to give Britton as great an opportunity as possible to replead.

I also note, finally, that I do not adopt the Magistrate Judge's Report insofar as it suggests that, as a factual matter, Britton "lied" when he filled out the form on which he failed to list the felony charges brought against him in Massachusetts. See Report, pp. 18-19. In his Objections to the Report, Britton contends that he possessed a good faith belief when he filled out the form that he was neither legally required, nor constitutionally required, nor required by the form's language, to list these two unsubstantiated charges. Thus, it is not accurate, at this stage of the litigation, to state that Britton "lied" when he filled out the form.

III. Conclusion

As Magistrate Judge Lee's report recommended, I dismiss all of Britton's claims with prejudice, except that (1) I do not dismiss the libel and breach of contract claims against DLJ, which DLJ did not move to dismiss; and (2) I dismiss the libel claims against the individual DLJ defendants with leave to replead.

SO ORDERED.

New York, New York
March 8, 1996

s/ Kimba M. Wood
KIMBA M. WOOD
United States District Judge

APPENDIX E - REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED ON SEPTEMBER 7, 1995

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 93 Civ. 3746 (KMW) (BAL).

RANDY BRITTON and CAROLYN BRITTON,

Plaintiffs,

v.

JOHN S. CHALSTY, et. al.,

Defendants.

**REPORT AND RECOMMENDATION
TO JUDGE WOOD**

* * *

BARBARA A. LEE, United States Magistrate Judge.

This is an action by a former employee of a brokerage firm seeking rescission of a settlement agreement relating to claims arising out of his termination, as well as other relief including declaratory judgment of the invalidity of certain rules and forms promulgated by the United States Securities and Exchange Commission ("SEC"), the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"). It was referred for pre-trial supervision, including initial case management conference, and report and recommendation on dispositive motions, by Order of Reference entered October 22, 1993. The 24 named defendants break down into five groups: (1) plaintiff's former employer Donaldson, Lufkin & Jenrette Securities Corpora-

tion ("DLJ") and certain of its employees and affiliates (collectively "the DLJ defendants"); the law firm that represented DLJ at the time of the settlement agreement, and two of its partners ("the attorney defendants"); NYSE and one of its officers; NASD and the SEC. All defendants have moved to dismiss the claims against them in whole or in part, on the grounds, among others, of legal insufficiency pursuant to Rule 12(b)(6), Fed. R. Civ. P., or lack of subject matter jurisdiction pursuant to Rule 12(b)(1). For the reasons discussed below, I recommend that all defendants' motions be granted and that the case proceed as to the only remaining claims, namely Counts III and IV of the Complaint against one or more of the DLJ defendants for libel and breach of contract, respectively.

FACTS

The following summary is based on the allegations of fact in the Amended Complaint and Exhibits 1-25 thereto, filed September 30, 1993 ("Am. Cplt") and in plaintiff Randy Britton's Affirmation executed April 18, 1994, filed in opposition to the motions to dismiss ("Pl. Aff."). I have disregarded all affidavits, exhibits and factual arguments submitted by any defendants in support of their Rule 12(b)(6) motions, because these motions can be determined on the basis of the pleading alone and are not appropriate for conversion to motions for summary judgment pursuant to the last sentence of Rule 12(b).

"Plaintiff" herein refers to plaintiff Randy Britton. Although his wife, Carolyn Britton, is joined as a plaintiff, the only claim asserted on her behalf is one for loss of consortium, which, as both plaintiffs concede, stands or falls with her husband's claims.

The five groups of defendants are as follows:

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(1) "DLJ Defendants": plaintiff's employer DLJ; its parent The Equitable Life Assurance Society of the United States ("Equitable"); an affiliated corporation, Donaldson, Lufkin & Jenrette, Inc.; and thirteen individual officers and employees of one or more of the corporate defendants (collectively referred to in this recommended decision as "the DLJ defendants").[1]

(2) "Attorney Defendants": Teitelbaum, Hiller, Rodman, Paden & Hibsher, P.C., the law firm that represented DLJ in connection with the settlement agreement; and William Hibsher and Herbert Teitelbaum, members of that firm;

(3) SEC;

(4) "NYSE defendants": NYSE and one of its officers or employees John R. Willsen; and

(5) NASD.

Allegations of the Complaint

The essential facts, taken as true for purposes of a Rule 12(b)(6) motion, Conley v. Gibson, 355 U. S. 41, 45-48 (1957); LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991), are as follows:

Plaintiff's Employment at DLJ

Plaintiff Randy Britton was employed by DLJ as an Associate in the Public Finance Division, located in New York

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[1] Although the caption also names as party defendants "other presently unknown DLJ employees," no one else has been sued and there are no allegations in the Amended Complaint that appear to state actionable conduct by persons whose names are not known to plaintiff.

City, beginning May 20, 1991. On that date, plaintiff signed a written authorization providing as follows:

> In connection with my application for employment, I authorize Donaldson, Lufkin & Jenrette, Inc. or any agency it designates to conduct an investigation of my character, reputation, personal characteristics, police and court records, mode of living and credit worthiness.
>
> To that end, I authorize my former employers, schools and any other persons to furnish DLJ, Inc. or any agency acting on its behalf, any information relevant to this investigation.
>
> I release DLJ, Inc. its agents and employers [sic; employees?], schools and any other persons from all liability in connection with this investigation. I realize that I may within a reasonable time request information concerning the nature and scope of this report.[2]

Plaintiff was also fingerprinted as required by section 17(f)(2) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C.§ 78q(f)(2), and submitted to a background and credit check and a drug test. Plaintiff was not aware of these regulatory requirements when he accepted DLJ's offer of employment, and at first refused to sign any authorization. When informed in substance that his employment was conditioned on compliance, he complied.[3] Thereafter he applied for registration with the NYSE, NASD, and other exchanges not here relevant, by submitting a "Uniform Application for Securities Industry Registration or Transfer" on Form U-4.[4] Item 22A of Form U-4 asked:

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[2] Ex. 7 to Cplt., eighth unnumbered page.

[3] Ex. 12 to Am. Cplt., p. 2 of letter dated Nov. 6, 1991.

[4] Ex. 6 to Am. Cplt.

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> Have you been convicted or plead (sic] guilty or nolo contendere ("no contest") to . . . (3) any other felony?[5]

Plaintiff responded by checking the box marked "no" and signed the page, which included an oath or affirmation that his answers were true and complete to the best of his knowledge.

Thereafter, defendant John R. Willsen of NYSE wrote DLJ requesting information about "the nature and circumstances surrounding [plaintiff's] arrests" reflected in "material returned from the FBI" as a result of the fingerprint check.[6] Although Mr. Willsen's letter does not specify the nature of the charges, plaintiff elsewhere refers to two misdemeanor charges[7] and "two counts of felony Assault with a dangerous weapon."[8] In fact, plaintiff had been acquitted of the

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[5] Id. at third unnumbered page.

[6] Ex. 12 to Am. Cplt., fifth unnumbered page. The material referred to in the letter as "attached" is not included in the exhibit.

[7] Memo from plaintiff to John R. Willsen and Thomas Lee dated October 1, 1991, attached to Pl. Aff., sixty-seventh unnumbered exhibit page.

[8] Am. Cplt. ¶ 106. See Also Central Registration Depository "Advisory Message" dated Sept. 6, 1991, attached to Pl. Aff., thirty-seventh unnumbered exhibit page. This document specifies that the information needed was

> whether the charge was classified as a felony or as a misdemeanor. If a misdemeanor, disclosure is not required. However, court documents must be provided to support the outcome. . . . If it was a felony, please submit court documents and an amended page 3 with original signatures. Question 22A3 should be answered "yes" if convicted or 22B if only charged, with complete details provided on a Disclosure Reporting Page.

felony charges, but was unwilling to furnish documentation to that effect because of his desire to "expunge" the record. He also believed that under the law of Massachusetts, where two of the charges were brought, he was protected against disclosure. Therefore, when DLJ requested that plaintiff furnish the information called for by NYSE, plaintiff on November 6, 1991, wrote a letter addressed to both Mr. Willsen and to defendant Thomas Lee, DLJ's Vice President and Director of Employment stating, "I flatly refuse to furnish the information and/or documentation requested."[9] After explaining plaintiff's understanding that this information was not required by law to be disclosed, and reciting that he had disclosed it orally to DLJ personnel, the letter concluded:

> DLJ is forbidden to send any correspondence to the NYSE or any other third person, referring to me, without my permission, expressed in writing. DLJ may transmit this letter to the NYSE, if it chooses, or DLJ can compensate me to send a letter more to DLJ's and the NYSE's liking. The authority to investigate me, which was never properly attained [sic; obtained?] or voluntarily given, is revoked.[10]

On December 16, 1991, defendants Harcum, Marino and Albano informed plaintiff "that he was being fired."[11] The reasons given at the time were that

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[9] Ex. 12 to Am. Cplt., p. 1 (bold-face type in original).

[10] Id. p. 2. The grounds for plaintiff's belief that he was not required to disclose the charges are more fully set out in Ex. 7 to Am. Cplt., particularly at p. 3, ¶ 2 and pp. 4-5, ¶ 3. There is also a more detailed discussion of the information plaintiff orally disclosed in Ex. 7 at 9-12.

[11] Am. Cplt. ¶¶ 106, 119.

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(1) BRITTON was telling other employees that he was considering bringing a discrimination lawsuit against DLJ, and (2) BRITTON had refused to supply the information they and the NYSE wanted, and (3) BRITTON had written them an unprofessional letter, the 6 Nov 91 Letter, in which BRITTON put his concerns in writing, and (4) because BRITTON had failed to list two counts of felony Assault with a dangerous weapon on the form U-4 in response to its question 22B."[12]

Plaintiff became concerned about how DLJ had learned of the "second Massachusetts charge," which was not referred to in the FBI response to the fingerprint check and which he believed was protected from disclosure.[13] On January 7, 1992, he complained to the Massachusetts Criminal History Systems Board in an effort to find out how DLJ "discovered this second charge."[14]

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[12] Id. ¶ 106.

[13] Ex. 7 to Am. Cplt. at 5-6, ¶¶ 7-8. Plaintiff's handwritten notation on the authorization dated May 20, 1991 (eighth unnumbered page following p. 16 of letter dated 10 January 1992) also says "Need to know how the 2d Mass charge was discovered."

[14] Ex. 7 to Am. Cplt. at 15; the Massachusetts complaint is also referred to in the settlement agreement, ¶¶ 6-7, included in Ex. 1 to Am. Cplt., as discussed below. Both the DLJ defendants and the attorney defendants proffer this document on the theory that it is "integral to plaintiff's claims," "Memorandum of Law in Support of Defendants Hibsher's; Teitelbaum's, and Teitelbaum, Hiller, Rodman, Paden & Hibsher, P.C.'s Motion to Dismiss the Amended Complaint" filed Dec. 23, 1993 at 7-8 n.5; "Memorandum of Law in Support of the DLJ and Equitable Defendants' Motion to Dismiss" filed Dec. 23, 1993, at 43 n.25. Although the fact of the filing, as discussed below, is material to the issues presented on these motions, the precise content of the document is not; it is accordingly unnecessary to expand the record on these motions to include it.

Meanwhile, plaintiff was considering his legal remedies arising out of his discharge, and settlement of those claims was being discussed.[15] Two key issues discussed during this period were (1) what, if anything, DLJ would say in response to any inquiry from prospective employers concerning plaintiff's reason for leaving; and (2) how DLJ had learned about the assault charges.[16]

As to the first question, DLJ's attorneys drafted several alternative versions of a proposed response, which were not satisfactory to plaintiff,[17] and plaintiff raised the question "whether a Form U-5 would be required."[18] Plaintiff concluded from his "own research of NYSE and NASD rules" that a Form U-5 was "not required"[19] but he wanted to know whether DLJ's attorneys agreed. DLJ's outside counsel, defendant William Hibsher, was "not available" but plaintiff spoke to defendant Michael A. Boyd, Senior Vice President and General Counsel of DLJ, who "said he didn't know and that he would check, but he never got back to [plaintiff].[20]

Plaintiff's allegations regarding the second matter discussed during settlement negotiations -- how DLJ discovered the "second Massachusetts charge" -- focus on a draft

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[15] Letters regarding settlement proposals, and drafts of the settlement agreement and a key exhibit thereto, are included in Exs. 7, 9, 10, 13 and 17 to Am. Cplt.; see also Am. Cplt. ¶¶ 62-64, 83-86.

[16] Am. Cplt. ¶ 154.

[17] Id. ¶69 and Ex. 9 thereto; see also id. ¶¶84-85.

[18] Id. ¶ 62. The reference is to Form U-5, Uniform Termination Notice of securities Industry Registration, one of the forms promulgated for self-regulatory organizations (including the NYSE and NASD) pursuant to section 17 (a) (1) of the Exchange Act, 15 U.S.C. § 78q(a)(1).

[19] Id. ¶64.

[20] Id. ¶¶ 62, 12.

of the settlement agreement dated March 12, 1992. That draft provided that DLJ would respond to inquiries from prospective employers with a "to whom it may concern" letter that would have included the following paragraph:

> DLJ terminated Mr. Britton's employment due to circumstances arising from a disagreement he had with the New York Stock Exchange concerning certain information which he was asked to supply to the Exchange in connection with his application for registration. In accordance with customary procedure, DLJ provided Mr. Britton's fingerprints to the appropriate regulatory agency. The standard search uncovered an arrest record, but no convictions. Mr. Britton objected to the Exchange's subsequent inquiry into his arrest record, which included a request for information concerning the background and circumstances surrounding his arrests.[21]

Plaintiff alleges that defendant Hibsher, in a telephone conversation on March 16, told him that the italicized language was "true."[22] In so doing he "lied or fraudulently represented" what DLJ had done, because "[i]f the charges were discovered pursuant to the,customary and standard search, then they would be in the NASD's CRD computer system and the NYSE would have a copy"; and because

> [i]t would take more than "customary procedure" and [t]he standard search" to overcome the Massachusetts privacy scheme .... It is more likely that DLJ obtained the services of a private investigator to access BRIT-

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[21]Ex. 9 to Am. Cplt., eighth unnumbered page (emphasis added).
[22] Am. Cplt. ¶ 153.

TON's record who used illegal and deceptive means to accomplish his goal.[23]

The Settlement Agreement

On March 16, 1992, a settlement agreement was executed, pursuant to which DLJ agreed to pay Britton $150,000 "[i]n full and complete satisfaction of any and all claims against DLJ and NYSE....[24]The claims being released by Britton were described as follows:

> Britton hereby fully releases and discharges DLJ and NYSE from any and all liability to him, and waives any and all rights of any kind and description that he has or may have against DLJ and NYSE as of the date of this Agreement, including, but not limited to, those arising in connection with his employment or separation from employment with DLJ, his application for registration with NYSE, or any and all other acts that may have violated his rights as a result of any alleged contractual relationship, whether express or implied, or any tort, or which could arise under any federal, state or local labor, employee benefit or fair employment practice law, or any civil rights law including, but not limited to, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the U.S. Constitution, the Laws of the State of New York, the City of New York, or the State of Massachusetts, or any other local,

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[23] Id. ¶¶ 155, 146, 150; see also id., ¶¶ 151, 158-59. The "CRD computer system" is described in id. ¶ 94, plaintiff's understanding of the Massachusetts law relating to sealing of criminal records in id. ¶¶ 140-144, 147, 149.

[24] "Settlement, Release, Covenant Not to Sue, Waiver and Non-Disclosure Statement" dated March 16, 1992 ("settlement agreement" or "Settl. Agr.") ¶ 2, included in Ex. 1 to Am. Cplt.

> state, or federal claim or any other duty or obligation of any kind or description. Further, Britton agrees not to file or cause to be filed in any state, federal or local court or before any state, federal or other governmental agency or entity or any administrative tribunal, any claim or complaint of any kind or nature, relating to any matter covered by this Agreement. This Agreement and covenant not to sue shall apply to all unknown, unsuspected and unanticipated claims, liens, injuries and damages of any type or nature as well as to those that are now known, including, but not limited to, tort claims, claims of employment discrimination and/or breach of contract, and/or claims for attorneys' fees.[25]

The question of how DLJ would respond to inquiries about plaintiff was resolved by a provision that plaintiff describes as the "name, rank, and serial number approach"[26]: DLJ agreed that it would "merely verify the dates of Britton's employment and his title.[27] There is no mention of a Form U-5.

With respect to the complaint plaintiff had filed in Massachusetts, the settlement agreement provided:

> Britton shall withdraw a certain complaint filed on or about "January 7, 1991" with the Massachusetts Criminal History Systems Board and/or Security and Privacy Council in which Britton alleges that DLJ improperly obtained Britton's criminal offender record information. Other than this complaint, Britton represents that he has not formally filed, nor is there pending, any claim of

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[25] Settl. Agr. ¶ 1.

[26] Am. Cplt. ¶ 85.

[27] Settl. Agr. ¶ 9.

> wrongful action or discrimination on the part of DLJ before any administrative agency or local, state of federal governments.
>
> The obligations assumed by DLJ under this Agreement shall be conditioned upon its receipt of signed copies of this Agreement executed by Britton and a document evidencing the withdrawal of the complaint filed by Britton with the Massachusetts criminal History Systems Board, as described in paragraph 6, above.[28]

Although the only parties to the agreement were plaintiff and DLJ, plaintiff released not only DLJ but NYSE and all of DLJ's "parent companies, subsidiaries, affiliates and divisions, and their respective present and former shareholders, representatives, officers, directors, agents, employees, successors, and assigns.[29]

Events Subsequent to Settlement

On or about June 3, 1992, DLJ filed with the NASD a Form U-5, signed by defendant Robert J. Albano, which reported plaintiff's termination as of December 31, 1991 and stated the reason as "Inability to comply with NYSE regulations."[30]

Plaintiff alleges that the statement of the reason for his termination was false; that the Form U-5 was not required to be filed; that it was filed late; that he was not simultaneously furnished with a copy as required by NASD Rules of Fair Practice, and that the filing was fraudulently con-

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[28] Id. ¶¶ 6, 7.

[29] Id. at 1, first "Whereas" paragraph, defining "DLJ" is used in ¶ 1.

[30] A copy of the Form U-5 is the first page of Ex.4 to Am. Cplt. The filing is alleged in Am. Cplt. ¶¶ 34 and 95 and referred to passim.

cealed.[31] A copy was mailed to him, in response to his request, on May 26, 1993.[32]

After he obtained a copy of the Form U-5, plaintiff attempted to reopen negotiations regarding his reinstatement. In a letter dated June 25, 1993, to defendant Boyd, plaintiff stated his position that "we no longer have an agreement" and that he planned to commence an action on June 29, which would be "devastating to DLJ" because the litigation would reveal information that might "result in the firm being publicly censured--at a minimum."[33] The record does not indicate what DLJ's response was; in any event plaintiff filed this action on June 3, 1993.

Plaintiff's Legal Theories

Plaintiff alleges that the reason for his termination stated on the Form U-5 was libelous and that DLJ's filing of the Form U-5 was a breach of the settlement agreement.[34] DLJ has not moved to dismiss the claims for libel and breach of contract against DLJ and I have accordingly entered a Scheduling Order simultaneously herewith regarding discovery and substantive motions relating to those claims.

In the alternative, plaintiff seeks rescission of the settlement agreement on the grounds Of (1) DLJ's material

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[31] Am. Cplt. ¶¶ 33-38, 51-52, 57, 62-75, 79-81, 89.

[32] Id. ¶ 36 and Ex. 4 thereto.

[33] Ex. 1 to Am. Cplt., first two unnumbered pages

[34] Counts III and IV, Am. Cplt. ¶¶ 93-133 (libel), 134-135 (breach of contract).

breach and (2) fraudulent inducement[35] and alleges that the facts pleaded also give rise to claims for the torts of deceit,[36] conspiracy,[37] intentional and negligent infliction of emotional distress[38] and, on behalf of plaintiff Carolyn Britton, loss of consortium.[39] Plaintiff concedes that "[w]ithout rescission, the remaining counts will not be viable."[40]

Finally, plaintiff seeks declaratory judgment of the invalidity of Exchange Act Rule 17a-3, Question 22B on Form U-4 and NYSE Rule 351, on the grounds that inquiries about arrests and criminal charges not resulting in conviction have disparate impact on Blacks and therefore amount to discrimination based on race in violation of Title VII of the Civil Rights Act of 1964, as amended, and various provisions of New York and Massachusetts law.[41]

DISCUSSION

Since pro se plaintiff Randy Britton is not a lawyer, his pleadings and other papers must be liberally construed in his favor. Haines v. Kerner, 404 U.S. 519, 520 (1972); Baker

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[35]Count IX, Am. Cplt. ¶¶ 171-78, in particular 1 172; Count I, ¶¶ 28-60 ("fraudulent concealment and fraudulent inducement"); Count V, ¶¶ 136-60 (fraudulent inducement).

[36]Count II, Am. Cplt. ¶¶61-92.

[37]Count VI, ¶¶ 161-64.

[38]Count VII,¶¶ 165-68.

[39]Count VIII, ¶¶169-70.

[40]AM. Cplt. ¶178.

[41]Count X, ¶¶ 179-200; prayer for relief, Am. Cplt. at 40-41.

v. Cuomo, 58 F.3d 814, 818 (2d Cir. 1995); LaBounty, 933 F.2d at 122. The complaint should not be dismissed pursuant to Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. This rule is "particularly applicable in pro se civil rights actions." Glendora v. Cablevision Systems Corp., 45 F.3d 36, 37 (2d Cir. 1995). Notwithstanding the technical arguments of some of the defendants that the pro se plaintiff's reply papers should not be construed as a second amended complaint, I have considered the reply papers to the extent that they may be construed as alleging any pertinent facts omitted from the operative pleading, and all reasonable inferences have been drawn in plaintiff's favor. See Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995).

Except for Count X, seeking declaratory judgment against SEC, NYSE and NASD, it is not entirely clear which claims are asserted against which defendants. Again construing the pro se pleading most favorably to the plaintiff, the following discussion assumes that (1) rescission is sought against all defendants whom plaintiff released pursuant to the settlement agreement; (2) the tort claims (other than the conspiracy claim) are asserted against DLJ, the attorney defendants, and one or more of the defendants who were officers or employees of DLJ at the times complained of; (3) the conspiracy claim is asserted against all the defendants named therein; and (4) the libel claim is asserted against the NYSE defendants.

The availability of the equitable remedy of rescission on the facts pleaded is discussed first, since if the settlement agreement is enforceable, it would appear to bar all of the remaining claims except Counts III and IV and parts of Count X.

Appendix E

I. RESCISSION

The equitable remedy of rescission is available in New York only where the pleading alleges

> fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; or a breach in the contract which substantially defeats the purpose thereof.

Babylon Assocs. y. County of Suffolk , 101 A.D.2d 207, 215, 475 N.Y.S.2d 869, 874 (2d Dep't 1984); see also Callanan v. Keeseville. Ausable Chasm and Lake Champlain R.R., 199 N.Y. 268, 284, 92 N.E. 747, 752 (1910); In re Kolinsky, 140 B.R. 79, 86 (Bankr. S.D.N.Y. 1992).

Plaintiff in this case relies on alternative theories of fraud in the inducement,[42] and material breach.[43]

A. FRAUDULENT INDUCEMENT

Counts I and V of the Amended Complaint refer to fraudulent inducement. Count 1, which is entitled "Fraudulent Concealment and Fraudulent Inducement," relates to events subsequent to the execution of the settlement agreement and is discussed below, Part IV.

The crux of plaintiff's claim for rescission on the basis of fraudulent inducement is set out in Count V. In substance, plaintiff alleges that DLJ, through its outside counsel Hibsher, falsely represented to plaintiff that it had discovered the Massachusetts assault charges through "customary pro-

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[42]Am. Cplt. ¶¶ 137-160.

[43]Pl. Aff. at 26.

cedure" involving a "standard search" by "the appropriate regulatory agency," when in fact it had acquired this information by other, possibly illegal means."[44] This representation "fraudulently induced [plaintiff] to sign the [Settlement] Agreement," because plaintiff "would not settle until [he] got an answer about how DLJ discovered the assault charges"; "[t]hese misrepresentations were made to induce [plaintiff] to abandon his allegation that DLJ conducted a non-standard search ....."and plaintiff "was induced to abandon his claim that he was wrongfully discharged in retaliation for having filed civil rights complaints against DLJ" and "was denied his opportunity to be re-instated...."[45]

Although both the DLJ defendants and the attorney defendants challenge the truth of these allegations, which is not in issue on a motion pursuant to Rule 12(b)(6), the legal insufficiency of Count V is apparent from the face of the pleading. Plaintiff's argument that he was misled about how DLJ discovered the Massachusetts charges is contradicted by ¶ 6 of the settlement agreement, incorporated by reference into the pleading. Plaintiff agreed to withdraw an administrative complaint filed in Massachusetts "in which Britton alleges that DLJ improperly obtained Britton's criminal offender record information."[46] Assuming the truth of the allegations that DLJ obtained this information by improper means, plaintiff was already aware of that before his telephone conversation with Hibsher on March 16 (the day he signed the settlement agreement). Thus he could not have been deceived by any representation to the contrary by Hibsher; nor could he have relied on any such statement.

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[44]Am. Cplt. ¶¶ 137, 139 (referring to Ex. 9), 147, 150,152-54.

[45]Id. ¶¶ 137, 154, 156,159, 160.

[46]Settl. Agr. ¶ 6, Ex. 1 to Am. Cplt.

This case falls squarely within the general rule that a party who is aware of a fact prior to settlement cannot thereafter use the issue as a basis for a claim of fraudulent inducement of the settlement itself. Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F. 2d 523, 527 (2d Cir. 1985) and authorities there cited; see also Finz v. Schlesinger, 957 F.2d 78, 81 (2d Cir.) (applying Bellefonte to waiver of ERISA claim, notwithstanding "closer scrutiny" required by statute), cert. denied, 113 S. Ct. 72 (1992) -Nor may a party rescind "merely because the consequences of a known injury are more serious or less serious than had been anticipated." Bailey v. New York City Transit Auth., 196 A.D.2d 854, 855, 602 N.Y.S.2d 177, 178 (2d.Dep't 1993); Finz, 957 F.2d at 83 ("a plaintiff who has settled a claim involving fraud may not subsequently assert that he or she is not bound by the settlement because the extent of the fraud was not fully disclosed").[47]

In sum, plaintiff's own pleading contradicts his assertion that he was deceived by any misrepresentation that anyone made about the discovery of his criminal record. It is therefore unnecessary to consider whether plaintiff's reliance was either justified or reasonable. As to reliance, however, plaintiff again undercuts his own conclusory allegation of inducement by the more specific factual allegation of what caused him to sign the settlement agreement on March 16, 1992: "Randy Britton was afraid that DLJ would withdraw their $150,000 offer as they had threatened to do."[48] In addition, plaintiff's emphasis on the logistics of access to his

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[47]Plaintiff's attempt to distinguish Finz on the ground that the respective contentions of the parties were expressly recited in the settlement agreement, Pl. Aff. at 32, is irrelevant to the black-letter law which the Court applied to the facts of that case.

[48]Pl. Aff. at 33, citing Ex. 17 to Am. Cplt.

criminal record -- for example, the practice with respect to docket entries in the Massachusetts courts[49] and the possibility that the SEC could have obtained the information[50] -- make clear that what plaintiff had "relied" on was his own belief that his employer would not be able to find out that he had lied on his Form U-4.

In this case, as in Tyson v. Cayton, 784 F. Supp. 69, 75 (S.D.N.Y. 1992) (Keenan, J.), "[t]he purpose of a settlement is to end litigation, not to provide a breather before the next round." The Amended Complaint alleges no basis for setting aside the settlement agreement on a theory of fraudulent inducement.

B. MATERIAL BREACH

Rescission is available as a remedy for breach of contract only where the breach is "'material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." Septembertide Publishing. B-V- v. Stein and Day, Inc., 884 F.2d 675, 678 (2d Cir. 1989) (quoting Callanan, 199 N.Y. at 284, 92 N.E. at 752). To be material, the breach must "'go to the root of the agreement between the parties,'" In re Ivan F. Boesky Securities Litigation, 825 F. Supp. 623, 636-37 (S.D.N.Y. 1993), aff1d, 36 F.3d 255 (2d Cir. 1994) (quoting Septembertide, 884 F.2d at 678); see also Canfield v. Reynolds, 631 F.2d 169, 178 (2d Cir. 1980). In contrast, where the alleged breach is of an "ancillary obligation," rescission is not an available remedy. Boesky, 825 F. Supp. at 636 (investment banking firm's breach of confidentiality agree-

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[49]Pl. Aff. at 31 n.27; see also plaintiff's letter of January 10, 1992, Ex. 7 to Am. Cplt., at 3.

[50]P1. Aff. at 33.

ment held, not a basis for rescission of contract engaging it to study corporate restructuring plan). In determining whether a breach is material or not, the pertinent inquiry is: "Would the innocent party have agreed to enter the contract without the inclusion of the disputed clause?" Lipsky v. Commonwealth United Corp., 551 F.2d 887, 895 (2d Cir. 1976).

In this case, plaintiff contends that the filing of the Form U-5 breached the provision of the settlement agreement specifying how DLJ would respond "[i]n the event that inquiries are made of DLJ concerning the circumstances surrounding the termination of Britton's employment or seeking an evaluation of Britton's performance.[51] The absence of any specific reference to the Form U-5, either in ¶ 9 or any other provision of the settlement agreement, compels the conclusion that the filing, if a breach, was not material.

Nor can the complaint be construed as alleging that the filing of the Form U-5, if a breach, was willful. On the contrary, plaintiff concedes that the filing was required by rules of NASD and NYSE to which DLJ was subject, but argues that DLJ's "contract" with NASD and NYSE was in conflict with its contractual obligation to him, and that "they... could have canceled their memberships with the NASD and the NYSE" because "financial ruin is no excuse for failing to meet contractual obligations."[52]

Assuming that DLJ's filing of the Form U-5 was a breach of the settlement agreement as plaintiff alleges in Count IV (a question which will be determined either on summary judgment or at trial), the facts alleged are insufficient as a

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[51]Settl. Agr. ¶ 9, Ex. 1 to Am. Cplt.

[52]Pl. Aff. at 28.

matter of law to establish that it was the kind of material breach that would entitle plaintiff to rescission.

II. CLAIMS BARRED BY THE SETTLEMENT AGREEMENT

If the settlement agreement is enforceable, all claims arising prior to March 16, 1992, against any of the persons released thereby are barred.

Pursuant to ¶ 1, Britton released both "DLJ" and NYSE from a broad range of claims, specifically including tort and civil rights claims as well as "unknown, unsuspected and unanticipated claims." The settlement agreement's definition of "DLJ" is broad enough to include Equitable and Donaldson Lufkin & Jenrette, Inc. ("parent companies, subsidiaries, affiliates and divisions, and their respective present and former shareholders"); Chalsty, Jenrette, Melone, Shen, Siegler, Rigg, Lee, Boyd, Albano, McGivney, Marino, Harcum and Green ("their . . . officers, directors, agents, employees"); and Hibsher, Teitelbaum and their law firm ("their... agents"). The claims against any of these defendants alleged in Counts II (deceit), V1 (conspiracy), VII (emotional distress) and VIII (loss of consortium) all relate to conduct prior to March 16, 1992, and are therefore expressly barred. Count X, seeking declaratory judgment of the invalidity of NYSE Rule 351, is also barred, since on March 16, 1992, plaintiff knew or should have known the facts on which his claim of invalidity is base. Warden v. E. R. Squibb & Sons, Inc., 840 F. Supp - 203 (E.D.N.Y. 1993) (broad release enforced against a terminated employee despite his claim of "cover-up") In this case, the release of all the claims referred to was the consideration for which the DLJ defendants bargained, on behalf of themselves, their lawyers, and NYSE, in exchange for the payment of $150,000 to plaintiff and the obligation DLJ undertook pur-

suant to ¶ 9. These claims should accordingly be dismissed as a matter of law.

III. ALTERNATIVE GROUNDS FOR DISMISSING CLAIMS ARISING PRIOR TO THE SETTLEMENT AGREEMENT

In the event that your Honor does not accept my recommendation that the remedy of rescission of the settlement agreement is unavailable as a matter of law, the substantive claims against the DLJ defendants and the attorney defendants should nevertheless be dismissed on the following alternative grounds:

Counts II and V: fraud is not pleaded with sufficient particularity. Rule 9(b), Fed. R. Civ. P., provides:

> [I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Although scienter may be demonstrated by inference,

> this must not be mistaken for license to base claims of fraud on speculation and conclusory allegations . . . . An ample factual basis must be supplied to support the charges.

O'Brien v. National Property Analysts Partners, 936 F-2d 674, 676 (2d Cir. 1991) (citations and internal quotation marks omitted); accord Acito v. Imcera Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995); Benedict v. Amaducci, No. 92 Civ 5239 (KMW)(BAL), 1995 WL 413206, at *6, 1995 U.S. Dist. LEXIS 9681 (S.D.N.Y. July 12, 1995). It is still the law in this Circuit that Rule 9(b) requires a plaintiff (i) to supply a factual basis for conclusory allegations regarding knowledge; (ii) to

plead specifically those events which he asserts give rise to a strong inference of defendant's knowledge; and (iii) to fix the time when these particular events occurred. Ross v. A. H. Robins Co., 607 F.2d 545, 558 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980); accord Connecticut Nat'l-Bank v. Fluor Corp., 808 F.2d 957, 961 (2d Cir. 1987).

Count VI: there is no civil tort of conspiracy under New York law. Alexander & Alexander v. Fritzen, 68 N.Y.2d 968, 503 N.E.2d 102, 510 N.Y.S.2d 546, 547 (1986); Hickey v. Travelers Ins. Co, 158 A. D. 2d 112, 118, 558 N. Y - S. 2d 554, 557 (2d Dep I t 1990) ; see also Grove Press Inc. v. Angleton, 649 F.2d 121, 123 (2d Cir. 1981). To the extent that plaintiff attempts to state a claim fo2r conspiracy to violate his civil rights under 42 U.S.C. § 1985(3), his conclusory and speculative allegations are insufficient. See, e.g., Julian v. New York City Transit Auth., 857 F. Supp. 242, 252 (E. D. N. Y. 1994), af f I d, 52 F.3d 3 12 (2d Cir. 1995) (table); Katz v. Klehammer, 902 F.2d 204, 208 (2d Cir. 1990) (allegations of racial animus essential); Ostrer v. Aronwald, 507 F.2d 551, 553 (2d Cir. 1977); Williams y. Reilly, 743 F. Supp. 168, 173 (S.D.N.Y. 1990) (conclusory allegations of pro se pleading insufficient). The purpose of the conspiracy here alleged was "primarily to conceal the registration conspiracy/scandal and other ethical problems at DLJ."[53] The allegation that there was a "secondar[y]" purpose of "racial discrimination"[54] is not supported by any statements of fact. The entire theory of conspiracy consists of the allegations that defendants Marino, Harcum and "others" had a meeting to determine the amount to be offered plaintiff in settlement, and that

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[53]AM. Cplt. ¶164.

[54]Id.

> [i]t can be implied [sic; inferred?] that SHAN, CHALSTY, BOYD, HIBSHER, ALBANO and others were at this meeting. These men and the NYSE all conspired to deny BRITTON his civil rights.[55]

In his papers in opposition, plaintiff appears to rely exclusively on State law,[56] as well as to add new allegations as to the nature of wrong:

> A second conspiracy or the same conspiracy with more or different players involves the libelous Form U-4 [sic; U5?] which must add the NASD because they published it. This tort certainly involves the NASD and DLJ or DLJ Inc. or both. They have agreed to file and publish libelous Form U-5, if the need be....[57]

These virtually incoherent allegations do nothing to correct the defect of the conspiracy claim pleaded in the Amended Complaint.

Count VII: the facts stated do not give rise to a legally sufficient claim for emotional distress. See Howell v. New York Post Co., 81 N.Y.2d 115, 121, 122, 612 N.E.2d. 699, 702, 596 N.Y.S.2d 3501 353 (1993); Martin v. Citibank. N.A., 762 F.2d 212, 220 (2d Cir. 1985); Robinson v. Town of Colonie, 878 F. Supp. 387, 408-09 (N.D.N.Y. 1995); Realmuto v. Yellow Freight System, Inc., 712 F. Supp. 287, 289 (E.D.N.Y. 1989).

Count VIII: Carolyn Britton's derivative claim for loss of consortium fails if her husband's claims are legally insufficient. See, e.g., Milam v. Herrlin, 819 F. Supp. 295, 306-07

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[55]Id. ¶ 163.

[56]Pl. Aff. at 40.

[57]Id. at 41.

(S.D.N.Y. 1993) (Sweet, J.); Holmes v. City of New Rochelle, 190 A.D.2d 713, 714, 593 N.Y.S.2d 320, 321 (2d Dep't 1993). In any event she cannot recover for loss of consortium in the absence of allegations of physical injury to the spouse, which are not present here. See generally Millington v. Southeastern Elevator Co, 22 N.Y.2d 498, 505, 239 N.E.2d 897, 900-01, 293 N.Y.S.2d 305, 310 (1968) (recognizing cause of action for loss of consortium and overriding prior precedent) ; Collins v. Willcox, Inc., 158 Misc. 2d 54, 58, 600 N.Y.S.2d 884, 886-87 (S. Ct. N.Y. County 1992).

Count IX: as discussed above, rescission is a remedy, not a cause of action. Zola v. Gordon, 685 F. Supp. 354, 374 (S.D.N.Y. 1988). To be entitled to invoke it this equitable remedy, plaintiff must plead and prove one of the grounds recognized in New York. See Callanan, discussed above, pp. 15-22. Whether he has done so or not, Count IX is superfluous.

IV. CLAIMS FOR DECLARATORY JUDGMENT

Count X of the Amended Complaint seeks declaratory judgment that the SEC's Exchange Act Rule 17a-3, 17 C.F.R. 240.17a-3, is "discriminatory" in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), on the ground that it has disparate impact on Black applicants for employment.[58] NYSE Rule 351 and Question 22B Of NASD Form U-4 are challenged on the same grounds, and are also alleged to violate New York and Massachusetts anti -discrimination laws.[59]

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[58]Am. Cplt. ¶¶ 198, 180-96; prayer for relief ¶ e) at 40.

[59]Id. ¶¶ 197, 199-200; prayer for relief ¶¶ f), g) at 41.

Appendix E

SEC, NYSE and NASD all move to dismiss the claims against them pursuant to Rules 12(b)(1) and (6), Fed. R. Civ. P., on the grounds of lack of subject matter jurisdiction and the inapplicability of Title VII.[60] In addition, SEC argues that plaintiff lacks standing to assert the claim; and that there is no facial conflict between Title VII and Rule 17a-3.[61] NYSE and NASD also challenge the applicability of New York or Massachusetts law.[62] All of these arguments have merit; since all claims can be dismissed either for lack of subject matter jurisdiction or insufficiency as a matter of law, the arguments based on standing and State law are not addressed in this recommended decision.

A. LACK OF SUBJECT MATTER JURISDICTION

SEC argues that the court lacks jurisdiction on the grounds that the United States has not waived sovereign immunity with respect to the claim asserted[63] and that the exclusive remedy for a challenge to Rule 17e-3 is an administrative proceeding reviewable in the Court of Appeals.[64] NYSE and NASD, although not protected by sovereign im-

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[60]"Memorandum in Support of Securities and Exchange Commission's Motion to Dismiss Complaint" filed Dec. 27, 1993 ("SEC Mem.") at 12-19; "Memorandum of Law of Defendants New York Stock Exchange, Inc. and John R. Willsen in Support of Motion to Dismiss the Amended Complaint" filed Dec. 27, 1993 ("NYSE Mem.") at 13-21; "Defendant National Association of Securities Dealers, Inc.'s Memorandum of Law in Support of its Motion to Dismiss" filed Dec. 23, 1993 ("NASD Mem.") at 4-21.

[61]SEC Mem. at 19-30.

[62]NYSE Mem. at 21-23; NASD Mem. at 21-23.

[63]SEC Mem. at 12-13.

[64]Id. at 16-19.

munity, rely on the exclusive jurisdiction of the SEC and the Court of Appeals.[65]

1. Sovereign immunity

It is "axiomatic" that the SEC is immune from suit in all circumstances save those in which Congress has expressly waived sovereign immunity. Sprecher v. Graber, 716 F.2d 968, 973 (2d Cir. 1983); see also United States v. Dalm, 494 U.S. 596, 608 (1990). The absence of consent is a jurisdictional defect. Lehman v. Makshian, 453 U.S. 156, 160 (1981); Kulawy v. United States, 917 F-2d 729 (2d Cir. 1990) . The general federal question statute cited by plaintiff, 28 U.S.C. § 1331, does not confer jurisdiction in the absence of a substantive right arising under federal law, whether statutory or common. See Nordlicht v. New York Tel. Co., 799 F.2d 859, 861-62 (2d Cir. 1986); Ivy Broadcasting Co. v. AT&T, 391 F.2d 486, 489 (2d Cir. 1968). Neither does § 1343(a), which "supplies a jurisdictional basis only if the action is otherwise authorized by law." Henderson v. Defense Contract Admin. Servs. Region, New York, 370 F. Supp. 180, 181 (S.D.N.Y. 1973). The Administrative Procedure Act and the Exchange Act, which plaintiff proposes to allege as jurisdictional bases in an amended pleading,[66] do nothing to cure the jurisdictional defect. The APA, 5 U.S.C. §§ 701 et seq. is not a grant of jurisdiction, express or implied. Califano v. Sanders, 430 U.S. 99, 107 (1977); Estate of Watson v. Blumenthal, 586 F.2d 925, 932 (2d Cir. 1978); Brito v. Diamond, 796 F. Supp. 754 (S.D.N.Y. 1992) (Carter, J.), Aff'd, 990 F.2d 1250 (1993) (table). The only jurisdiction conferred on the district courts by the Exchange Act is that specified in S 27, which relates to actions to "enforce any liability or duty cre-

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[65]NYSE Mem. at 13-20; NASD Mem. at 4-13.

[66]NYSE Mem. at 13-20; NASD Mem. at 4-13.

ated by" the Exchange Act or the SEC's regulations thereunder. 15 U.S.C. § 78aa; see First Jersey Secs.,Inc. v. SEC. 553 F. Supp. 205, 209 (D.N.J. 1982).

2. Judicial Review of Administrative Action.

The remedy for any unfairness in the operation of Exchange Act Rule 17a-3 is a petition to the SEC for "amendment or repeal" pursuant to 17 C.F.R. 102.4(a) and (b). Any "person adversely affected" by the SEC's administrative order dispositive of such a petition may seek review in the Court of Appeals for the appropriate circuit pursuant to § 25(b) of the Exchange Act, 15 U.S.C. § 78y(b)(1). The Courts of Appeals have exclusive jurisdiction of such proceedings, barring suits in district courts seeking similar relief. See Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 78-79 (D.C. Cir. 1984); Brito, 796 F. Supp. at 761.

NYSE Rule 351 requires member organizations to report promptly any employee who "is arrested, arraigned, indicted or convicted of, or pleads guilty to, or pleads no contest to, any criminal offense (other than minor traffic violations)." Form U-4,which is used by NYSE, NASD, as well as many State regulators, was approved by the SEC in 1975 as means of facilitating the collection of information needed for regulatory purposes without duplicative paperwork. See Exchange Act Release No. 11,424 [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,176 at 85, 325 (May 16, 1975). Both NYSE as a national securities exchange registered under § 6 of the Exchange Act, 15 U.S.C. § 78f, and NASD as a national securities association registered pursuant to § 15A of the Exchange Act, 15 U.S.C. § 78o-3, are required to promulgate rules, including rules with respect to the qualification of members and their employees, which must be approved by, and may be changed by, the SEC in accordance with administrative procedures corresponding to those applicable to the commission's own rule-making. See

15 U.S.C. §§ 78f(a), (b), (c)(2), (c)(3)(B); 78o-3(b)(6); 78s(b)(1), (c) and (h)(1); 5 U.S.C. § 553(e); Exchange Act Rule 17a-3(a)(12) and (g), 17 C.F.R. § 240.17a-3 (a)(12) and (g). The remedy for any person seeking amendment or repeal of an NYSE or NASD rule corresponds to one which applies to the SEC's own rules: a petition before the Commission, followed by review of its order in the appropriate Court of Appeals. Maschler v. NASD, 827 F. Supp. 131 (E.D.N.Y. 1993); Independent Investor Protective Leacrue v. New York Stock Exchange, 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973); McLaughlin. Piven, Vogel, Inc. v. NASD, 733 F. Supp. 694 (S.D.N.Y. 1990) (Mukasey, J.); see also Higgins v. SEC, 866 F. 2d 47 (2d Cir. 1989). Any lacunae in this jurisdictional structure must be remedied by Congress, not the district courts. See Association of Inv. Brokers v. SEC, 676 F.2d 857, 864 (D.C. Cir. 1982)(absence of jurisdiction over challenge to compulsory arbitration provisions of Form U-4).

This court therefore lacks jurisdiction of the subject matter of plaintiff's challenge to SEC Exchange Act Rule 17a-3, NYSE Rule 351 and Form U-4, because the limited jurisdiction over administrative rulemaking conferred by § 25(b) of the Exchange Act resides in the Courts of Appeals. Plaintiff's remedy is to petition the Commission and thereafter, if aggrieved, to seek review in the Court of Appeals for the First Circuit, where he resides, or for the District of Columbia, as specified in § 25 (b)(1) of the Exchange Act.

B. INAPPLICABILITY OF TITLE VII

Title VII of the Civil Rights Act of 1964, as amended, makes it unlawful for an "employer" to discriminate on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). "Employer" is defined to mean

> a person engaged in an industry affecting commerce who has fifteen or more employees for each working

> day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States . . . .

42 U.S.C. § 2000e(b). Related provisions prohibit discrimination by employment agencies and labor unions. § 2000e-2(b) and (c). Discrimination by agencies of the federal government with respect to their own employees or applicants for employment is governed by a separate section, 47 U.S.C. §2000e-16, not here in issue. The statute makes no reference to government regulatory agencies such as the SEC or self-regulatory organizations such as the NYSE and NASD, and our research has discovered no case imposing liability on such an entity for discrimination by an employer arising from enforcement of the rules of a federal agency or a self-regulatory organization. On the contrary, the few reported decisions on this point hold regulators outside the scope of Title VII. See, e.g., National Organization for Women v. Waterfront Comm'n, 468 F. Supp. 317 (S.D.N.Y. 1979) (Knapp, J.)(commission that licensed stevedores held, not their employer pursuant to Title VII); Lavender-Cabellero v. Department of Consumer Affairs, 458 F. Supp. 213 (S.D.N.Y. 1978)(Sweet, J.)(city agency licensing process servers); see also E.E.O.C. v. Waterfront Comm'n, 665 F. Supp. 197 (S.D.N.Y. 1987); Fields v. Hallsville Indep. School Dist., 906 F. 2d 1017 (5th Cir. 1990), cert. denied, 498 U.S. 1026 (1991)(teachers terminated for failing State teacher certification examination had no Title VII cause of action against State); cf. Rutherford v. S.E.C., 842 F.2d 214 (9th Cir. 1988)(NYSE request for arrest and conviction information on Form U-4 did not violate California law, since NYSE was not applicant's employer).

Accordingly, even if this court had jurisdiction of plaintiff's claims for declaratory judgment, they should be dismissed for legal insufficiency, on the grounds that relief

under Title VII is not available against entities who have never been plaintiff's employer.

V. CLAIMS ARISING AFTER MARCH 16, 1992

Counts I, III and IV allege facts occurring after March 16, 1992, so that the claims to which they give rise are not barred by the settlement agreement.

Count I is entitled "Fraudulent Concealment and Fraudulent Inducement" and relates to the DLJ defendants' failure to notify plaintiff promptly of the filing of the Form U-5. In his papers in opposition to the motions to dismiss, plaintiff makes clear that this count is pleaded for the purpose of tolling the statute of limitations, apparently on the claims against the DLJ defendants for breach of contract and libel.[67] If the statute of limitations is tolled with respect to either of those claims, it operates to preclude defendants from relying on that defense, but it is not a separate cause of action entitling plaintiff to relief on either of his claims. Count I should accordingly be dismissed on that ground.

Although Count III is entitled "Libel," its factual allegations relate for the most part to Britton's charges that the DLJ defendants violated the federal securities laws in a number of ways. The crux of this count appears to be that

> a false U-5 adversely affects BRITTON'S employment prospects in the Securities Industry. In fact, until the Form U-5 is expunged from the CRD system, BRITTON has no chance at employment in the securities industry and (NYSE] Rule 345.11 causes BRITTON to further

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[67] Pl. Aff. at 12-13.

publish his own defamatory material by giving a copy of the Form U-5 to a prospective employer.[68]

To the extent that this count is asserted against NYSE, it does not state a claim for libel, and should be dismissed as to that defendant pursuant to Rule 12(b)(6). See, e.g., Cubby Inc. v. CompuServe, Inc, 776 F. Supp. 135, 141 (S.D.N.Y. 1991)(Leisure, J.); Browne v. N.Y.S. Court Sys., 599 F. Supp. 36, 37 (E.D.N.Y. 1984). In the alternative, if a claim for libel were otherwise stated under New York law, it should be dismissed on the ground that NYSE is immune from claims of this nature under the self-regulatory scheme of the Exchange Act, which pre-empts State law. See Austern v. Chicago Bd. Options Exch., 898 F. 2d 882 (2d Cir.), cert, denied, 498 U.S. 850 (1990); Mandelbaum v, New York Mercantile Exch., No. 93 Civ 8302 (AGS), 1995 WL 456399, at *13-14, 1995 U.S. Dist. LEXIS 10783, at *19 (S.D.N.Y. Aug. 2, 1995)(Schwartz, J.); Trama v. New York Stock Exchange. Inc., 1978 Fed. Sec. L. Rep. (CCH) ¶ 96,748 (S.D.N.Y. Sept. 14, 1978) (Motley, J.); see also Merrill Lynch, Pierce. Fenner & Smith v. Ware, 414 U.S. 117, 136 (1973) (dictum).

The DLJ defendants have not moved to dismiss Counts III and IV, except to the extent that plaintiff presses those claims against individual defendants who are joined but as to whom no allegations of wrongdoing are pleaded (Part VI, below) .

V1. DEFENDANTS AGAINST WHOM NO WRONGDOING IS ALLEGED

Three of the five groups of defendants include individuals or corporations named in the caption and in the introduc-

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[68] Am. Cplt. ¶ 133.

tory identifying paragraphs, but against whom there are no specific allegations of wrongdoing.

DLJ Defendants

Equitable is identified as the parent of DLJ and Joseph J. Melone and Richard H. Jenrette as its president and chairman of the board, respectively.[69] None of these defendants is mentioned in the body of the complaint except for a footnote reference to a claim which might be brought against Equitable in the future.[70]

Donaldson Lufkin & Jenrette Inc. (referred to by plaintiff as "DLJ Inc." to distinguish it from his employer DLJ) also appears to have been named solely because of the possibility that plaintiff may assert a claim against it in the future.[71] Although plaintiff refers passim to "DLJ or DLJ, Inc.," the relationship between DLJ and DLJ Inc. is nowhere alleged. Since all of plaintiff's specific allegations of wrongdoing are reasonably construed as referring to the employer DLJ or officers of that company, there is no discernible basis for liability on the part of DLJ, Inc.

Thomas E. Siegler, Gerald B. Rigg, Thomas Lee, John S. Chalsty, Theodore Shen, Eugene J. McGivney, Benedict T. Marino and Joseph A. Harcum are identified by the offices they held with one or more corporate defendants.[72] Chalsty is also alleged to have been "born and raised in South Af-

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[69] Am. Cplt. ¶¶ 20, 7, 6, respectively.

[70] Id. ¶ 1 n.2.

[71] Id.

[72] Am. Cplt. ¶¶ 9, 10, 11, 5, 8, 14, 15, 16, respectively.

rica"[73]; and Harcum, who "maintains a small group of confederate soldier statues in his office," to have been "raised on a Virginia Farm.[74] These individuals are mentioned in the body of the complaint only in passing[75] or in broad conclusory allegations [76]

Attorney Defendants

Defendant Herbert Teitelbaum is sued "in his official capacity as Chair of the Board of Teitelbaum, Hiller, Rodman, Paden & Hibsher, P.C." on the theory that "he is the 'indispensable party' necessary to bring [the law firm] under the court's jurisdiction.[77] This novel theory is not explained, and no facts are stated that can be construed as giving rise to any liability on the part of Teitelbaum, whether the law firm is properly joined or not.

Willson of NYSE

Defendant John R. Willsen is described as "a NYSE employee who was a Senior Registration Specialist in the Qualifications and Registrations section of the NYSE" and "now works in the Enforcement section of the NYSE."[78] He is not mentioned elsewhere in the complaint, but appears to

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[73] Id. ¶ 5.

[74] Id. ¶ 16.

[75] E.g., Am. Cplt. ¶ 66 (Boyd); ¶ 151 (Rigg); ¶¶ 45, 99 (Lee); ¶¶ 40-45 (McGivney); ¶¶ 39, 45-46 (Marino and Harcum).

[76] E.g., id. ¶ 116 (Chalsty and Shen); ¶ 33 (McGivney); 163 (Marino and Harcum).

[77] Am. Cplt. caption; ¶ 23.

[78] Id. ¶ 24.

have been joined because he signed the letter initiating the inquiry into plaintiff's criminal record that eventually led to plaintiff's termination.[79]

In sum, no facts are alleged from which any theory of liability on the part of any of these defendants might be deduced. Accordingly, the Amended Complaint should be dismissed as to them.

If the pro se plaintiff's failure to allege a factual basis of liability for these defendants were the only grounds for dismissal as to them, the dismissal would be without prejudice. To the extent, however, that the claims against DLJ are legally insufficient in ways that cannot be corrected by re-pleading (as discussed above, Parts I-III), these defendants should also have the benefit of a dismissal with prejudice.

CONCLUSION

All claims against the DLJ defendants should be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., except Counts III and IV, as to which discovery is to proceed.

To the extent that plaintiff's claim for libel (Count III) is asserted against NYSE or defendant Willsen, it should be dismissed pursuant to Rule 12(b)(6).

All claims against the attorney defendants should be dismissed pursuant to Rule 12(b)(6).

Plaintiff's claims against the SEC, NASD and NYSE for declaratory judgment should be dismissed pursuant to Rule 12(b)(1) or in the alternative pursuant to Rule 12(b)(6).

---

[79] Ex. 12 to Am. Cplt., fourth and fifth unnumbered paqes.

Leave to replead should be denied, because the defects in the Amended Complaint are not matters that can be cured by repleading. All dismissals should therefore be with prejudice.

NOTICE

The foregoing constitutes my recommended decision pursuant to 28 U.S.C. § 636(b)(1)(B). Any party may object to this recommendation within 10 business days of the date of mailing by filing written objections with the Clerk of the Court and mailing copies to the opposing party, to the Hon. Kimba M. Wood, U.S.D.J., and to the undersigned. Failure to file objections within 10 business days will preclude appellate review. See 28 U.S.C. § 636 (b)(1); Rules 6(a), 6(e) and 72(b), Fed. R. Civ. P.; Thomas v. Arn, 474 U.S. 140 (1985); Wesolek v. Canadair Ltd., 838 F. 2d 55, 58 (2d Cir. 1988).

/s Barbara A. Lee
BARBARA A. LEE
United States Magistrate Judge

Dated: New York, New York
September 17, 1995

APPENDIX F – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC DATED AND FILED ON SEPTEMBER 29, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No .99-7333, 99-9376

RANDY BRITTON, CAROLYN BRITTON

Plaintiff-Appellants,

-vs-

JOHN S. CHALSTY, et. al.,

Defendant-Appellees.

Before
Winter, Chief Judge
Sack, Circuit Judge,
and Hodges, District Judge.

Entered: September 29, 2000

* * *

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Randy Britton and Carolyn Britton.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk

s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX G – NASD NOTICES TO MEMBERS 76-43 DATED DECEMBER 27, 1976

*1976 NASD LEXIS 11, *; 1976 Notice to Members 43*

Copyright (c) 1976 National Association of Securities Dealers, Inc.

NASD Notices to Members

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
1735 K STREET NORTHWEST
WASHINGTON D.C. 20006

NTM Number 76-43

1976 NASD LEXIS 11; 1976 Notice to Members 43

December 27, 1976

[*1] IMPORTANT

SUBJECT: Adoption of a Uniform Termination Notice for Securities Industry Representatives and/or Agents - Form U-5

IMPORTANT

ATTN: Registration and Compliance Personnel

Effective January 1, 1977, the NASD will utilize Form U-5, "Uniform Termination Notice for Securities Industry Representative and/or Agent," as the required form for termination of the registration of principals or representatives associated with NASD members. As the membership is aware, NASD firms are required to **promptly** furnish written notice

to the Board of Governors concerning the termination of the employment of a registered person. Such requirement is stated in Section 5 of Article XV of the Association's By-Laws. Presently Form T-325, "Notice of Termination of Registration," is utilized for such purpose but will be replaced by the new uniform document. Although declaring the form effective for NASD use as of January 1, 1977, the Association has given consideration to mail delays and for lead times necessary for the membership to alter internal procedures for use of the Form U-5. In this regard, termination notices on NASD Form T-325 will be accepted by the Association until February 1, 1977.

The **[*2]** Form U-5 was developed by the Ad Hoc Committee of the Uniform Requirements Committee of the North American Securities Administrators Association. The committee composed of representatives of the Securities and Exchange Commission, self-regulatory organizations, state jurisdictions as well as securities industry trade organizations sought to standardize all existing termination forms into one uniform document. In this regard, effective January 1, 1977, the Form U-5 is also an acceptable form for termination of registered personnel not only with the NASD but also with national stock exchanges and a substantial majority of state jurisdictions. Based on a survey conducted by the Ad Hoc Committee, the Form U-5 will **not** be accepted for the termination of individuals licensed in the states of California, Maine, Mississippi, New Jersey and New York. With respect to state jurisdictions, it should be noted that the bottom of Form U-5 contains information relating to certain state supplemental requirements. In this regard, the name abbreviations of states which required submission of the agent's license, card or certificate and/or the signature of the agent to be terminated are included **[*3]** on the form.

Appendix G

Under joint agreement, Association members which are also members of the New York Stock Exchange will receive their initial supply of Form U-5 in accord with procedures established by that organization. Reorders for such members will also be handled by the NYSE. For all other NASD members, an initial supply of Form U-5 is enclosed herewith. Additional forms are available through the NASD's Office Services Administrator located in the Executive Office in Washington or through your local NASD District Office. In this regard, it should be noted that processing of such reorder requests is expedited if a self-addressed mailing label is included with the request.

The uniform termination notice, Form U-5, is substantially identical to the current NASD Form T-325. In this regard, members should utilize the same reporting procedures in effect for reporting on the now obsolete form. By way of clarification, questions 9(c) on Form U-5 requires the brokerage firm to indicate if the individual to be terminated was the subject of any major complaint or any legal proceeding by a customer of the firm. For NASD purposes, the term "major complaint" should be deemed to mean any written **[*4]** statement of a customer or any person acting on behalf of a customer alleging a grievance involving the activities of a registered person in connection with the solicitation or execution of any transaction or the disposition of funds or securities of that customer. Such interpretation of the term "major complaint" conforms to the language contained in Section 21(d) of the Association's Rules of Fair Practice.

Finally, it should be noted that Form U-5 should not be submitted to the Association if the individual has submitted a Form U-4 application but has not taken and passed ap-

propriate qualification examinations. In these cases, a withdrawal of the Form U-4 application should be requested. Any questions regarding this notice should be directed to Mr. Joseph Hill, Assistant Director of the Association's Registration Section at (202) 833-7184.

Sincerely,

Frank J. Wilson
Senior Vice President
Regulatory Policy
and General Counsel

APPENDIX H – EEOC LETTER DATED MARCH 6, 1974 STATING THAT THE SECURITIES INDUSTRY ARREST RECORD INQUIRY VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

March 6, 1974

Mr. Stanley Mazaroff
Venable, Baetjer and Howard
Attorneys-at-Law
1800 Mercantile Bank & Trust Building
Baltimore, Maryland 21201

Dear Mr. Mazaroff:

This is to acknowledge receipt of a copy of your letter to Mr. Robert M. Bishop regarding the New York Stock Exchange Rule on the use of arrest records.

The aforementioned rule is in violation of Title VII of the Civil Rights Act of 1964, as amended.

If we can be of assistance in this matter, please let us know.

Sincerely,

William A. Carey
General Counsel

By: Issie L. Jenkins
Associate General Counsel
Legal Counsel Division

BEST AVAILABLE COPY

THE New York Stock Exchange

RECEIVED
OFFICE OF THE SECRETARY
JUN 23 1975

Mr. George A. Fitzsimmons
Secretary
Securities and Exchange Commission
500 North Capitol Street, N.W.
Washington, D. C. 20549

June 23, 1975

Re: File No. 57-563

We have had an opportunity to review the proposed amendment of Rule 17a-3(a)(12)(A)(8) under the Securities Exchange Act of 1934, modifying the requirement for the maintenance of arrest records by broker/dealers.

The Exchange believes that the attached correspondence, including an opinion from the Equal Employment Opportunity Commission, concerning arrest records, may be of assistance to the Commission in arriving at its decision to amend Rule 17a-3.

We appreciate your affording us the opportunity to comment on this proposal.

Very truly yours,

J. C. Buck

Attachment

Supreme Court, U.S.
FILED
MAR 1 2001
OFFICE OF THE CLERK

No. 00-1080

IN THE

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION AND JOHN R. WILLSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent National Association of Securities Dealers, Inc. has no parent companies and no public shareholders.

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Securities Exchange Act Rel. No. 41326 (April 22, 1999), 64 Fed. Reg. 23366 (April 30, 1999) (File No. SR-NASD-98-96) 4

Securities Exchange Act Rel. No. 41560 (June 25, 1999), 64 Fed. Reg. 36059 (July 2, 1999) (File No. SR-NASD-98-96) 2

Respondent National Association of Securities Dealers, Inc. ("NASD") submits this brief in opposition to the petition of Randy Britton ("Britton") for a writ of certiorari.

STATEMENT OF THE CASE

This case concerns the termination of Britton's employment at the securities firm of Donaldson, Lufkin & Jenrette Securities Corp. ("DLJ") in late 1991. That event was set in motion by Britton's failure, after being hired by DLJ earlier in 1991, to disclose certain information about himself in response to Question 22B on Form U-4, Uniform Application for Securities Industry Registration or Transfer. (Pet. App. 16a, 28a-31a).[1] In order to work in the securities industry, the Securities and Exchange Commission ("SEC") requires securities brokers and certain other persons employed by securities firms to be registered with at least one national securities association such as the NASD or a national securities exchange such as Respondent New York Stock Exchange (17 C.F.R. § 240.15b7-1), and registration in such organization requires submission of a Form U-4 (Pet. App. 52a-53a).

The NASD is a self-regulatory private corporation registered with the SEC as a national securities association.[2] As an integral part of a comprehensive system of federal regulation of the securities industry, the NASD regulates the

1. "Pet. App." followed by a page number refers to a page in Petitioner's Appendix in his Petition for a Writ of Certiorari.

2. The summary in this paragraph about the NASD is borrowed from the recent decision in *Desiderio v. National Association of Securities Dealers, Inc.*, 191 F.3d 198, 201 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 756 (2001).

over-the-counter securities market, which includes securities firms and registered representatives who buy and sell over-the-counter securities. Its authority is exercised under the close supervision of the SEC, which must approve all the NASD's rules and regulations. The Form U-4, in each of its versions, has been approved by the SEC. *See, e.g.*, Securities Exchange Act Release No. 41560 (June 25, 1999), 64 Fed. Reg. 36059 (July 2, 1999) (File No. SR-NASD-98-96) (approving most recently the electronically submitted Form U-4); *see also* Pet. App. 52a (concerning original SEC approval of the Form U-4 in 1975).

Insofar as the NASD is concerned, Britton's case is directed at the validity of Question 22B on the Form U-4.[3] That question requires applicants for jobs as securities brokers to disclose certain criminal charges even when the charges did not result in convictions. Britton specifically alleges that the challenged question constitutes race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

Question 22B is mandated by SEC Rule 17a-3(a)(12)(i)(g) codified at 17 C.F.R. § 240.17a-3(a)(12)(i)(g). Insofar as relevant here, that regulation requires all NASD members to include in each application for employment executed by an "associated person," such as Britton was at the time, a "record of any arrest or indictment for any felony, or any misdemeanor pertaining to securities, commodities, banking, insurance or real estate . . . fraud, false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting or extortion, and the disposition of the foregoing."

3. The question is now 23B, but that is immaterial for present purposes.

By order of March 8, 1996 the United States District Court for the Southern District of New York held that it lacked subject matter jurisdiction over Britton's challenge to Question 22B because Britton had failed to exhaust his administrative remedies with the SEC (Pet. App. 22a-23a). That order was among those included in the order of summary affirmance by the United States Court of Appeals for the Second Circuit as to which Britton now petitions for a writ of certiorari.

In its March 8, 1996 order the District Court expressly declined to adopt the recommendation of the Magistrate Judge to whom the case had been referred that the Title VII claim might also be dismissed because neither the NASD nor the New York Stock Exchange ("NYSE") was Britton's employer (Pet. App. 23a, 53a-55a). Accordingly, the courts below disposed of Britton's challenge to the non-conviction arrest record question exclusively on grounds of failure to exhaust administrative remedies and did not reach the issue of the applicability of Title VII to the NASD and the NYSE, although Britton now includes that issue among his "questions presented." The courts below also did not reach consideration of whether the NASD and the NYSE might be state actors, the other one of the four "questions presented" by Britton that pertains to the NASD.[4]

In the nearly five years since the District Court's decision that Britton had failed to exhaust his administrative remedies with respect to the Form U-4, the SEC has twice

4. The two questions Britton presents about the Form U-5 concern whether DLJ should have filed a Form U-5 in connection with Britton's termination of employment and whether the statements made on the form by DLJ are entitled to an absolute privilege under state law. Those claims are directed solely at DLJ.

solicited comments concerning changes to the Form. *See* Securities Exchange Act Release No. 41326 (April 22, 1999), 64 Fed. Reg. 23366 (April 30, 1999) (File No. SR-NASD-98-96) and Securities Exchange Act Release No. 37289 (June 7, 1996), 61 Fed. Reg. 30272 (June 14, 1996) (File No. SR-NASD-96-19). Britton did not avail himself of the opportunity to participate in those proceedings. He has also never petitioned the SEC for amendment or repeal of Rule 17a-3(a)(12)(i)(g), as he has the right to do under 17 C.F.R. § 201.192 — the rule in which the SEC has embodied its procedures fulfilling the Congressional directive that "[e]ach [administrative] agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Administrative Procedure Act, § 4(d), 5 U.S.C. § 553(e).

REASONS FOR DENYING THE WRIT

BRITTON'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES PRESENTS NO SIGNIFICANT LEGAL ISSUE

Far from presenting an important question, this case involves only Britton's continuing refusal to exhaust administrative remedies before seeking judicial relief. As this Court has recognized:

> Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.

Reiter v. Cooper, 507 U.S. 258, 269 (1993) (*citing Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)).

The proper forum for Britton to resolve his challenge to Question 22B on the Form U-4 and the SEC rule from which it derives is not a federal district court, but an administrative proceeding at the SEC[5] with public notice and participation followed by judicial review exclusively in the appropriate United States Court of Appeals designated by statute. 15 U.S.C. §§ 78y(a)(1) and (b)(1). In such a proceeding Britton could raise his Title VII and public policy concerns, while other interested persons could also be heard. As the Second Circuit has pointed out:

> The rationale behind the exhaustion doctrine is that a court's refusal to intervene prematurely in the administrative process gives the agency the opportunity to develop factual findings, to apply its expertise to new issues and to exercise its discretionary powers.

Touche, Ross & Co. v. SEC, 609 F.2d 570, 574 (2d Cir. 1979).

In the nearly eight years since he initiated this case Britton has neither availed himself of the opportunities presented by the SEC to participate in public comments on changes to Form U-4 nor has he petitioned the SEC for a rule change. Whatever the merits of Britton's attack on SEC Rule 17a-3(a)(12)(i)(g) and Question 22B on Form U-4, the proper forum for their resolution is not in this case, which is primarily concerned with his termination of employment at DLJ, but in an administrative proceeding at the SEC with the requisite public notice and participation and judicial

5. Britton could either petition the SEC for a rule change at any time under the procedures set forth in 17 C.F.R. § 201.192, or, if he prefers, await an opportunity when the SEC next solicits comments concerning changes to the Form U-4.

review in the appropriate United States Court of Appeals. That is the procedure which Congress mandated, and Britton has not brought forward any reason for departing from it here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

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Dealers, Inc.

Supreme Court, U.S.
FILED
MAR 2 2001

No. 00-1080

IN THE

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION AND JOHN R. WILLSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION

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(212) 450-4000

Attorneys for Respondent Donaldson, Lufkin & Jenrette Securities Corporation

* *Counsel of Record*

QUESTION PRESENTED

Whether the lower courts correctly applied the law of New York in denying Petitioner's libel claim?

STATEMENT PURSUANT TO RULE 29.6

Respondent Donaldson, Lufkin & Jenrette Securities Corporation is a wholly-owned subsidiary of Credit Suisse First Boston (USA) Inc., which is a wholly-owned subsidiary of Credit Suisse Group, an entity that has issued equity securities that are publicly traded in Europe.

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Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (3d ed. 1999) ... 11

Respondent Donaldson, Lufkin & Jenrette Securities Corporation ("DLJSC") respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.[1]

STATEMENT OF THE CASE

A. Factual Background

DLJSC is a registered broker-dealer and a member of both the National Association of Securities Dealers, Inc. (the "NASD") and the New York Stock Exchange, Inc. (the "NYSE"). As such, DLJSC is subject to regulation by the Securities and Exchange Commission (the "SEC") and by self-regulatory organizations, including the NASD and the NYSE, which are in turn also regulated by the SEC. *See* 15 U.S.C. §§ 78f(b)(1), 78s(g)(1)(A), (B).

Petitioner *pro se* Randy Britton is a graduate of the United States Military Academy and Harvard Business School, Pet. at 5, who was employed by DLJSC from May to December 1991 as an associate in the New York City office of DLJSC's Public Finance Division. Pet. App. 27a-28a, 30a.[2]

---

1. In the proceedings below, DLJSC's former parent corporation, Donaldson, Lufkin & Jenrette, Inc. ("DLJ"), and DLJ's former parent corporation, The Equitable Life Assurance Society of the United States, were also named as defendants, as were several present or former officers or employees of those three entities. Of these former parties, however, the Petition names only DLJSC as a respondent before this Court.

2. Citations herein to "Pet." and "Pet. App." refer to pages in the original Petition for a Writ of Certiorari and its appendix, respectively, rather than to Petitioner's belated "corrected" Petition.

In connection with his employment by DLJSC, in August 1991 Mr. Britton completed a Form U-4, the Uniform Application for Securities Industry Registration. In response to question 22B on that form, which asks "Have you . . . ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2)?," Britton answered "no." Pet. App. 29a.

After Mr. Britton's Form U-4 was submitted, DLJSC received a notice from the NASD, Pet. App. 29a n.8, and a subsequent letter from John R. Willsen of the NYSE, transmitting the results of an FBI check of Mr. Britton's fingerprints, which reflected certain arrests on two apparent felony charges, and requesting an explanation from Mr. Britton of the circumstances surrounding those arrests.[3] Pet. App. 29a-30a.

DLJSC asked Mr. Britton to furnish the information requested by the NYSE. In a letter dated November 6, 1991 addressed to both Mr. Willsen of the NYSE and a DLJ employment officer, Mr. Britton stated that he

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3. The Securities Exchange Act of 1934 (the "Exchange Act") and regulations promulgated by the SEC thereunder impose obligations on broker-dealers to conduct investigations into the background of "associated persons." *See* 15 U.S.C. § 78q(f)(2); 17 C.F.R. § 240.17a-3(a)(12)(i)(g). Rules of both the NYSE and NASD impose similar requirements, in order to protect investors and the integrity of the securities markets. *See* NYSE Rule 345.11(a); NASD Rule 3010(e). Any member firm, or its registered or non-registered employee who "refus[es] or fail[s] . . . to furnish information to . . . the Exchange or such other self-regulatory organization, or fail[s] to take any of the foregoing actions on the date or within the time period that the Exchange requires. . . ." is subject to disciplinary sanctions. NYSE Rule 476(a)(11); *see also* NYSE Rule 476A.

"flatly refuse[d]" to furnish the information requested and that he forbade DLJ from sending any correspondence regarding him to the NYSE without his express written consent. Pet. App. 30a. Mr. Britton added that "[y]ou have hardened my resolve to defy both the NYSE and DLJ," Pet. App. 9a-10a, but closed the letter by offering an alternative, stating that "DLJ can compensate me to send a letter more to DLJ's and the NYSE's liking." *Id.*

According to the Petitioner, DLJSC subsequently learned that in addition to the arrests that had appeared on the FBI fingerprint report, he had been charged in Massachusetts with another felony, assault with a dangerous weapon, that had not been disclosed on the Form U-4. Pet. App. 11a, 31a-32a.

On December 16, 1991, DLJSC informed Mr. Britton that it was terminating his employment. Pet. App. 30a. On March 16, 1992, the parties executed a Settlement, Release, Covenant Not to Sue, Waiver, and Non-Disclosure Agreement, pursuant to which DLJSC paid Mr. Britton $150,000 "[i]n full and complete satisfaction of any and all claims against DLJ and NYSE." Pet. App. 34a. In return, Mr. Britton granted a broad release and covenant not to sue, in which Mr. Britton released DLJSC, its affiliates, officers and employees, and the NYSE, *inter alia*, "from any and all liability to him," for claims

> . . . arising in connection with his employment or separation from employment with DLJ, his application for registration with NYSE, or any and all other acts that may have violated his rights as a result of any alleged contractual relationship, whether express or implied, or any tort, or which could arise under any federal, state or local labor,

> employee benefit or fair employment practice law, or any civil rights law including, but not limited to, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the U.S. Constitution, the laws of the State of New York, the City of New York, or the State of Massachusetts, or any other local, state, or federal claim or any other duty or obligation of any kind or description. . . .

Pet. App. 34a-35a.

Sometime after the settlement agreement was entered into, DLJSC learned that the automated registry maintained by the NASD still showed Mr. Britton to be an employee of DLJSC. No definitive answer was apparent from NASD regulations as to whether DLJSC was required to file a Form U-5, the Uniform Termination Notice for Securities Industry Registration, in Mr. Britton's case, where he had initiated but not completed the securities industry registration process. DLJSC therefore contacted the NASD and was instructed that DLJSC was required to file a Form U-5 in such circumstances. *See* Pet. App. 8a-9a.

Having been so advised, on June 3, 1992 DLJSC electronically filed a Form U-5 with respect to Mr. Britton and sent a written copy to the NASD. Pet. App. 36a. On that form, in response to Question 12, which asked for "REASON FOR TERMINATION," DLJSC checked the box for "Other" rather than the potentially more harmful "Discharged."

In response to the form's requirement of an explanation for such an answer, DLJSC wrote: "Inability to comply with NYSE regulations." Pet App. 9a.

B. Proceedings Below

Petitioner filed the complaint *pro se* in *Britton v. Chalsty, et al.*, 93 Civ. 3746 ("*Chalsty I*") in the United States District Court for the Southern District of New York on June 3, 1993. The amended complaint was filed on September 30, 1993. In *Chalsty I*, Petitioner asserted claims against DLJSC, its parent corporations DLJ and The Equitable and various officers and employees of those three entities for fraudulent inducement into the settlement agreement, deceit, libel, breach of the settlement agreement, conspiracy, intentional and negligent infliction of emotional distress, loss of consortium (on behalf of his wife, Carolyn Britton) and rescission of the settlement agreement, and against the NYSE, Mr. Willsen of the NYSE, the NASD and the SEC for, *inter alia*, a declaratory judgment that "Inquiries in the Securities Industry about Arrests, Criminal Complaints, Criminal Informations, or Criminal Indictments are Racially Discriminatory Against Blacks."

The various defendants moved to dismiss the complaint in *Chalsty I* for failure to state a claim, except that DLJ and certain of its employees did not move to dismiss two of the claims — for libel and for breach of the settlement agreement — that were based on the filing of the Form U-5, which occurred after the date of the settlement agreement. In an order dated March 8, 1996, Pet. App. 15a, *et seq.*, United States District Judge Kimba M. Wood substantially adopted the recommendations set forth in a September 7,

1995 report and recommendation, *see* Pet. App. 25a, *et seq.*, and granted the defendants' various motions to dismiss. Petitioner moved for reconsideration of that decision, which was denied in an opinion and order dated April 15, 1997.

Following a discovery period, the remaining DLJ defendants moved for summary judgment on the two claims that had not been dismissed, for breach of the settlement agreement and libel based on the filing of the Form U-5. In an order dated February 20, 1998, *see* Pet. App. 4a, *et seq.*, Judge Wood granted that motion, adopting a report and recommendation dated September 13, 1996, *see* Pet. App. 7a, *et seq.* The district court agreed with the magistrate judge that Mr. Britton's libel claim was barred by the absolute immunity pertaining to statements on a Form U-5 as a matter of New York law. Pet. App. 5a, 9a. In addition, based on Mr. Britton's own contemporaneous letters to DLJSC and the NYSE, the district court found that no rational jury could find DLJSC's statement of the reason for Mr. Britton's separation from employment provided in that form — "Other — Inability to comply with NYSE regulations" — to be defamatory. Pet. App. 5a, 9a-10a. The district court also agreed that the filing of the Form U-5 had not been a breach of the settlement agreement as a matter of that agreement's plain and unambiguous language. Pet. App. 5a-6a. Judgment dated February 27, 1998 originally was entered in *Chalsty I* on March 2, 1998.

On February 18, 1994, seven days before their responses to the defendants' motions to dismiss were due in *Chalsty I*, Mr. Britton and his wife commenced a second action in the Southern District of New York, *Britton v. Chalsty, et al.*, 94 Civ. 1118 ("*Chlasty II*"), asserting claims of employment

discrimination and repeating many of the claims asserted in their first action. Through a series of orders, all proceedings in that action were stayed while dispositive motions were being considered in *Chalsty I*. After judgment in *Chalsty I* had been entered, defendants moved to dismiss the complaint in *Chalsty II*. In an order dated August 4, 1999, the district court dismissed Britton's claims under the doctrines of res judicata and collateral estoppel. Judgment was entered in that action on August 9, 1999.

Mr. Britton appealed to the United States Court of Appeals for the Second Circuit from the judgments entered against him in both cases. Those appeals were consolidated and, in a summary order dated June 15, 2000, the lower courts' orders were affirmed. Pet. App. 1a. Mr. Britton moved for rehearing and petitioned for rehearing *in banc*, which motion was denied on September 29, 2000.

REASONS FOR DENYING THE WRIT

The lower courts properly applied New York law in denying Petitioner's libel claim, concluding that the statement on Petitioner's Form U-5 was subject to absolute privilege from defamation claims and that, in any event, the statement was not reasonably susceptible of a defamatory meaning. Neither of these grounds for the decisions below presents an issue warranting review by this Court. *See* Sup. Ct. R. 10.

I.

THERE IS NO FEDERAL ISSUE PRESENTED

1. Petitioner concedes that his libel claim in this diversity action is governed by the substantive law of New York. Pet. at 19; *see Erie R. Co. v. Tompkins*, 304 U.S.

64, 78 (1938). Under New York law, an absolute privilege against defamation claims pertains to statements made on a Form U-5, which are considered by New York courts to be an integral step in a quasi-judicial proceeding conducted by the NYSE and other self-regulatory organizations.[4] *See Herzfeld & Stern, Inc. v. Beck*, 175 A.D.2d 689, 690-91, 572 N.Y.S.2d 683, 685 (1st Dept. 1991), *appeal dismissed*, 79 N.Y.2d 914, 581 N.Y.S.2d 666 (N.Y. 1992), *leave to appeal dismissed*, 82 N.Y.2d 789, 604 N.Y.S.2d 550 (N.Y. 1993), *and leave to appeal dismissed*, 89 N.Y.2d 1064, 659 N.Y.S.2d 848 (N.Y. 1997). The lower courts correctly applied this principle in denying Petitioner's libel claim here.

In *Herzfeld & Stern*, New York's intermediate appellate court concluded that statements on a Form U-5 fall within the absolute privilege under New York law pertaining to "statements uttered in the course of a judicial or quasi-judicial proceeding." 175 A.D.2d at 691, 572 N.Y.S.2d at 685 (citing *Wiener v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (N.Y. 1968)). The court noted the established principle that the absolute privilege applicable to such proceedings "attaches not only to the hearing stage, but to every step of the proceeding in question even if it is preliminary and/or investigatory and irrespective of whether formal charges are ever presented." *Herzfeld & Stern*, 175 A.D.2d at 691, 572 N.Y.S.2d at 685 (emphasis added). The filing of Form U-5, the court reasoned, constitutes an essential step in the "comprehensive system of

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4. "Communications afforded an absolute privilege are perhaps more appropriately thought of as cloaked with an immunity, rather than a privilege against the imposition of liability in a defamation action. This absolute immunity . . . protects communications irrespective of the communicant's motives . . ." when public policy seeks to foster the communication at issue. *Toker v. Pollak*, 44 N.Y.2d 211, 219, 405 N.Y.S.2d 1, 4 (N.Y. 1978).

oversight and self-regulation by the NYSE . . . in order to ensure adherence by members of the industry to both the statutory mandates and ethical standards of the profession," *id.*, justifying application of the absolute privilege to statements contained in such forms.

The decision in *Herzfeld & Stern* has been recognized by New York courts (both state and federal) to be the "controlling" statement of New York law on the issue. *Grieve v. Barclays Capital Securities Ltd.*, No. 602820/98, 1999 WL 1680654 at *6 n.6 (N.Y. Sup. Ct. Sept. 10, 1999); *see also Culver v. Merrill Lynch & Co.*, Fed. Sec. L. Rep. (CCH), ¶ 98,811, 1995 WL 422203 at *5 (S.D.N.Y. July 17, 1995); *but see Acciardo v. Millenium Sec. Corp.*, 83 F. Supp. 2d 413, 420 (S.D.N.Y. 2000) (suggesting, in *dicta*, that *Herzfeld* conflicted with earlier Second Circuit decision in *Fahnestock & Co. v. Waltman*).[5] Under *Erie*, the decision binds federal courts in diversity cases as the definitive statement of New York law absent "persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999) (citing, *inter alia*, *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)).

5. In *Fahnestock & Co. v. Waltman*, 935 F.2d 512 (2d Cir. 1991), *cert. denied*, 502 U.S. 492 (1991), *cert. denied*, 502 U.S. 1120 (1992), decided two months before *Herzfeld & Stern*, the Second Circuit refused to vacate an arbitration award under the "extremely limited" "manifest disregard of law" standard of review of arbitration awards under the Federal Arbitration Act, where the arbitrators had applied a qualified privilege in evaluating a Form U-5 defamation claim. *Fahnestock*, 935 F.2d at 515. Without the benefit of the *Herzfeld* decision, the court (as well as the arbitrators it was reviewing) was required to predict New York law on the issue, a prediction that would prove to be inaccurate only two months later when the *Herzfeld* decision was issued.

There is no reason to believe that the New York Court of Appeals would reach a result different from the court in *Herzfeld & Stern*. Indeed, the court had three separate opportunities to hear an appeal of that decision and in each of those instances the appeal, or the petition for leave to appeal, was dismissed.[6] Nor has any subsequent decision of a New York state court in the intervening ten years suggested that it was incorrectly decided. This is unsurprising, for *Herzfeld & Stern* and the numerous decisions that have applied it or cited it with approval, *see, e.g.*, *Culver*, 1995 WL 422203 at *5; *Grieve*, 1999 WL 1680654 at *6 n.6; *see also Dunn v. Ladenburg Thalmann & Co.*, 259 A.D.2d 544, 686 N.Y.S.2d 471, 472 (2d Dept.) (vacating arbitration award on libel claim that had been predicated on statements made in the course of NASD investigation), *leave to appeal denied*, 93 N.Y.2d 810, 694 N.Y.S.2d 632 (1999), are fully in accord with New York cases applying absolute immunity to the initiatory phase of other, sometimes less exacting, quasi-judicial proceedings. *See, e.g.*, *Wiener*, 22 N.Y.2d at 331-32, 292 N.Y.S.2d at 669 (complaint to grievance committee of bar association); *Weissman v. Mogol*, 118 Misc. 2d 911, 917-18, 462 N.Y.S.2d 383, 387-88 (N.Y. Sup. Ct. 1983) (petition to board of education complaining about teacher's performance).

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6. The decision of New York's highest court in *Toker v. Pollak*, 44 N.Y.2d 211, 405 N.Y.S.2d 1 (N.Y. 1978), relied on by Petitioner, was cited by the *Herzfeld & Stern* court in reaching its conclusion that absolute immunity applied to the statements in the Form U-5 in that case. The two decisions reflect two factual scenarios in which New York courts have drawn the line of absolute privilege differently. If, however, as Petitioner suggests, there is any tension between those two decisions, the New York Court of Appeals has declined at least those three opportunities to resolve it.

Petitioner contends that absolute privilege does not apply in his case because no investigation was commenced as a result of the filing of his Form U-5. But his suggestion that the absolute privilege attaches to statements in a Form U-5 only after a subsequent regulatory investigation has been commenced is directly contrary to New York law. As one court succinctly stated, "[i]t is of no consequence [to application of absolute privilege] that actual proceedings were never commenced by either the NASD or SEC." *Grieve*, 1999 WL 1680654 at *7 (citing *Herzfeld & Stern*, 175 A.D.2d at 691, 572 N.Y.S.2d at 685 (absolute privilege attaches "to every step of the proceeding in question even if it is preliminary . . . irrespective of whether formal charges are ever presented")). Indeed, such a rule, if it existed, would vitiate the intended benefits of the absolute privilege by conditioning the immunity of the reporting person on subsequent acts entirely out of his control.[7]

Finally, in addition to having no basis in New York law, Petitioner's assertion that absolute privilege should not apply because a Form U-5 was not required in his case is belied by both the applicable regulatory materials and by the undisputed record evidence. Both NYSE and NASD rules expressly require a Form U-5 to be filed within thirty days of the termination of any "registered" employee. *See* NYSE Rule 345.17; NASD By-laws Art. V, § 3(a). Moreover, a contemporaneous NASD Notice to Members clarifies that such a filing is required not only upon the departure of a

7. Petitioner repeatedly quotes from Judge Sack's treatise on defamation, Hon. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* (3d ed. 1999), in his efforts to evade the clear holding of *Herzfeld & Stern*, but fails to bring to the Court's attention the fact that Judge Sack was a member of the Second Circuit panel that unanimously affirmed the lower courts' orders below. *See* Pet. App. 1a.

"registered person," but also upon "a termination or resignation by an associated person . . . ," NASD Notice to Members No. 92-19 n.2 (April 1992), which Petitioner indisputably was. In any event, as the lower courts found, the NASD eliminated any uncertainty about whether a Form U-5 was required in Petitioner's case when it directly advised DLJSC that a Form U-5 would be required under the circumstances. *See* Pet. App. 8a.

2. This Court need not reach the pure state law question of what level of privilege pertained to the Form U-5 under New York law, however, because the courts below also denied Petitioner's libel claim on an alternative ground. Based principally on Petitioner's own contemporaneous letters to both DLJSC and the NYSE, the district court concluded that no reasonable jury could find the description of the circumstances of Petitioner's departure from employment on the Form U-5 — "Inability to comply with NYSE regulations" — to be false, precluding any cause of action for libel. Pet. App. 5a, 9a-11a.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioner's contention that the decision of the Second Circuit below is in conflict with decisions of the Sixth and Seventh Circuits of the United States Court of Appeals, *see Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132 (6th Cir. 1996); *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994), is without merit.

Similar to the Second Circuit below, the courts in both *Baravati* and *Glennon* sought to apply the law of the forum

state in deciding whether an absolute privilege applied to statements on a Form U-5. In *Baravati*, the Seventh Circuit sought to predict how Illinois courts would decide the issue, acknowledging that there was no precedent under that state's law on the issue. 28 F.3d at 707. Similarly, in *Glennon*, the Sixth Circuit attempted to apply Tennessee law on the issue, again without the benefit of state court precedents on point.[8] 83 F.3d at 137. In both cases, the courts of appeal predicted that the state in question would apply a qualified, rather than an absolute privilege to such statements. The application of different state laws by different Circuits of the United States Court of Appeals does not raise a Circuit conflict of any form, much less the type of Circuit conflict that would merit this Court's intervention.[9] *See* Sup. Ct. R. 10(a).

Moreover, both *Baravati* and *Glennon* arose in an entirely different procedural posture than the case below. In both of those decisions, the courts of appeal were reviewing a challenge to arbitral awards under the "manifest disregard of the law" standard of review that has evolved under the Federal Arbitration Act. Given the deference to arbitration embodied in that Act, review under the "manifest

8. Indeed, the *Glennon* court expressly declined to follow *Herzfeld & Stern* "[b]ecause New York is not the proper choice of law in this case. . . ." *Glennon*, 83 F.3d at 136.

9. Moreover, the *Baravati* court observed that "the sky would not fall if the privilege were allowed to bar the kind of relief sought by Baravati," and that "denial of the privilege puts [the employer] in a hard place, where if they state a reason discreditable to the employee they may be sued for libel while if they lie about the reason they will be violating the association's rules." 28 F.3d at 708. In short, the *Baravati* court recognized the policy considerations that underlie the New York rule but decided that Illinois law would reach a different result.

disregard" standard (in those courts where that judicially-created standard is recognized, *see Baravati*, 28 F.3d at 706), is "very narrow," requiring a showing that the arbitral decision flies "in the face of clearly established legal precedent." *Glennon*, 83 F.3d at 136. Because there had been no state court decision on the issue in either Illinois or Tennessee at the time of the arbitration awards in those cases, neither award could have been reversed under this standard for applying a qualified privilege, even if the applicable state law actually would have applied an absolute privilege to statements on a Form U-5.

Unlike *Baravati* and *Glennon*, the proceedings below did not involve a challenge to an arbitration award but were instead originally brought in the district court based on diversity jurisdiction, under which the lower courts were bound to apply the law of New York, the forum state, *see Erie R. Co.*, 304 U.S. at 78, and as previously discussed, *Herzfeld & Stern* is the definitive articulation of that law.

III.

THE OTHER "QUESTIONS PRESENTED" IN THE PETITION ARE NOT PROPERLY BEFORE THIS COURT

Among its four "Questions Presented," the Petition includes two questions that are never addressed. They are:

> Does the non-conviction arrest record inquiry required by 17 C.F.R. § 240.17a-3 comply with Title VII of the Civil Rights Act of 1964 and Public Policy?

and

Are the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) state actors?

Pet. at i. Because these issues have not been fairly presented in the Petition, they should not be considered by the Court. *See* Sup. Ct. R. 14(1)(a).

Even had Petitioner fairly raised those issues, however, they do not offer a basis for granting the writ in this case. As to the first question, the lower courts recognized that the claim was not actionable in these proceedings because Petitioner had failed to exhaust his administrative remedies within the SEC. Pet. App. 23a, 52a-53a.[10]

As to the second question, whether the NYSE or the NASD is a "state actor" was not preserved below and, in any event, is irrelevant to Petitioner's underlying declaratory judgment claim, which was predicated on Title VII. That enactment relates to employment discrimination by "employers," 42 U.S.C. § 2000e(b), not "state actors." *See* Pet. App. 53a-54a (September 7, 1995 report and recommendation).

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10. Had Petitioner sought a rulemaking and been denied, his recourse would have been an appeal to the appropriate Circuit of the United States Court of Appeals, which has exclusive jurisdiction over such matters, *see* 15 U.S.C. §§ 78y(a)(3), (b)(3), thus barring original proceedings in the district courts on such issues. *See Telecomms. Research & Action Center v. Federal Comms. Comm'n*, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-1080

IN THE

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION AND JOHN R. WILLSEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS NEW YORK STOCK EXCHANGE, INC. AND JOHN R. WILLSEN

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QUESTION PRESENTED

Did the lower courts properly decline to exercise subject matter jurisdiction over Petitioner's challenge to inquiries concerning arrest records because he failed to exhaust his administrative remedies?

STATEMENT PURSUANT TO RULE 29.6

Respondent New York Stock Exchange, Inc. is a corporation organized under the New York Not-For-Profit Corporation Law. It has no corporate parents, and no publicly held company owns ten percent or more of the stock of New York Stock Exchange, Inc.

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Respondents the New York Stock Exchange, Inc. (the "NYSE" or the "Exchange") and John R. Willsen respectfully request that this Court deny the petition filed by Randy Britton ("Mr. Britton" or "Petitioner") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

In two separate actions commenced in the United States District Court for the Southern District of New York, Mr. Britton sought a declaration that Question 22B of the Form U-4, Uniform Application for Securities Industry Registration and Transfer ("Form U-4") discriminates on the basis of race in violation of Title VII of the Civil Rights Act of 1964.

The district court dismissed all claims against the NYSE and John R. Willsen, an employee of the NYSE. In pertinent part, in the first action ("*Chalsty I*"), the district court determined that it was without subject matter jurisdiction to entertain Mr. Britton's declaratory judgment claims because Mr. Britton had failed to exhaust his administrative remedies with respect to challenges to the Form U-4. In addition, the district court held that the settlement agreement between Mr. Britton and his former employer, Donaldson, Lufkin & Jenrette Securities Corporation ("DLJSC"), of which the NYSE was a third-party beneficiary, was fully enforceable and precluded such claims. In the second action ("*Chalsty II*"), the district court similarly dismissed all claims against the NYSE and Mr. Willsen on the grounds of lack of subject matter jurisdiction and failure to exhaust administrative remedies, as well as on res judicata grounds, holding that the claims that were before the district court in the second action were or could have been litigated in the first action.

Mr. Britton appealed both dismissals in a consolidated appeal to the United States Court of Appeals for the Second Circuit. In a summary order dated June 15, 2000, the Court of Appeals affirmed the decisions of the district court.

The pertinent facts are recited in the brief in opposition to the petition submitted by DLJSC and need not be repeated herein.

REASONS FOR DENYING THE WRIT

Only two of the petition's four "Questions Presented" relate to the NYSE:

1. Does the non-conviction arrest record inquiry required by 17 C.F.R. § 240.17a-3 comply with Title VII of the Civil Rights Act of 1964 and Public Policy?

2. Are the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) state actors?

(Pet. at i.)

Review of the first question is not warranted because the district court properly dismissed Petitioner's declaratory judgment actions with respect to arrest record inquiries on the ground that he had failed to exhaust his administrative remedies. The SEC Rules of Practice required Petitioner to petition the Securities and Exchange Commission ("SEC") for rulemaking before pursuing any judicial remedy. *See* Admin. Procedure Act ("APA"), 5 U.S.C. § 553(e) (2000); *see generally* Rules of Practice, 17 C.F.R. § 201.1, *et seq.* (2000).

The second question also does not warrant review. Petitioner appears to contend that the NYSE and NASD are state actors, subjecting them to the constitutional prohibitions against compelled self-incrimination. The Exchange is not a state actor subject to the constraints of the privilege against self-incrimination, and there is no conflict among the courts of appeal on this issue.[1]

Moreover, the Court should not consider these questions because they have not been fairly presented in the petition.

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1. In *United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975), the court of appeals held that "[m]ost of the provisions of the Fifth Amendment, in which the self-incrimination clause is embedded, are incapable of violation by anyone except government in the narrowest sense." 509 F.2d at 867. Thus, the court held that the privilege against self-incrimination did not attach to statements made to the Exchange in the course of an Exchange investigation because the Exchange conducted investigations "in pursuance of its own interests and obligations, not as an agent of the SEC." *Id.* at 869. The *Solomon* court recognized that while the SEC had the authority to oversee such self-regulation, this general oversight did not make the Exchange an arm of the government. *Id.* at 868-69. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) and *Desiderio v. National Ass'n of Securities Dealers, Inc.*, 191 F.3d 198 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 756 (2001), cited in the petition, did not address the privilege against self-incrimination.

I.

THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS BECAUSE HE FAILED TO FOLLOW STATUTORILY MANDATED PROCEDURES FOR CHALLENGING SEC RULES

NYSE has been registered with the SEC as a national securities exchange since 1934 pursuant to the Securities Exchange Act of 1934 ("Exchange Act"). *See* Exchange Act § 6(a)–6(b); 15 U.S.C. § 78f(a)–78f(b) (2000). In furtherance of its obligations under the Exchange Act, the NYSE examines and verifies the qualifications of applicants to become associated with an exchange member or member organization in order to determine if that person meets the standards of training, experience and competence prescribed by its rules. *See* Exchange Act § 6(c)(3)(B); 15 U.S.C. § 78f(c)(3)(B). As a part of the process established to monitor the qualifications of persons working in the securities industry, SEC Rule 17a-3 requires brokers and dealers and members of national securities exchanges to keep certain records regarding each "associated person." For example, they must make and keep current a questionnaire or application for employment executed by each associated person which contains information concerning any arrest or indictment for any felony, or certain misdemeanors, and the disposition thereof. *See* SEC Rule 17a-3(a)(12)(i)(g); 17 C.F.R. § 240.17a-3(a)(12)(i)(g).

Information is also obtained from the Form U-4. The Form U-4 was developed through a joint effort of the SEC, NYSE, NASD and other self-regulatory organizations and was first approved by the SEC in May 1975. The SEC and NYSE are able to verify criminal background information voluntarily supplied by an individual by

submitting his or her fingerprints to the Federal Bureau of Investigation ("FBI"). *See, e.g.*, SEC Rule 17f-2–17f-2(a); 17 C.F.R. § 240.17f-2(a) (2000).

In compliance with these processes mandated in the public interest and to protect investors, DLJSC required Petitioner to complete a Form U-4 and provide fingerprints to the NYSE for submission to the FBI. In *Chalsty I* and *Chalsty II*, Mr. Britton sought a declaration that the procedures for obtaining information about prior arrests discriminate on the basis of race. Mr. Britton did not, however, challenge the NYSE's authority to obtain fingerprints.

The APA requires each federal agency to give an interested person the right to petition for the issuance, amendment or repeal of a rule promulgated by the agency. *See* 5 U.S.C. § 553(e) (2000). The SEC Rules, which permit such a petition to be filed with the Secretary of the SEC, parallel the APA's rulemaking requirements. The rulemaking process followed by the SEC with respect to the rules of registered exchanges has been summarized as follows:

> The Exchange Act provides for the registration of national securities exchanges if their rules are "just and adequate to insure fair dealing and to protect investors," 15 U.S.C. § 78s(b), and directs the SEC to supervise the Exchanges. If plaintiff wishes to influence or change Exchange policy, his remedy is to petition the SEC to exercise its powers under § 19(b) of the Act to recommend changes in Exchange rules, or to alter or amend the rules. The Administrative Procedure Act, § 4(d), 5 U.S.C. § 553(e) provides that "[e]ach

> agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." If plaintiff is "aggrieved" by SEC action relating to Exchange rules, the APA § 10, 5 U.S.C. § 702 gives him the opportunity for judicial review.

Indep. Investor Protective League v. N.Y. Stock Exch., Inc., 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973). Thus, a challenge to the Form U-4 may be made under section 553(e) of the APA and section 19(c) of the Exchange Act by petitioning the SEC for rulemaking. This procedure permits the SEC "to utilize its discretion, apply its expertise, correct its own errors, and handle its business expeditiously." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 616 F.2d 1363, 1370 (5th Cir. 1980).

Both the APA and the Exchange Act provide for judicial review by petition to the court of appeals for the circuit in which the petitioner resides or has his or her principal place of business, or to the Court of Appeals for the District of Columbia, within 60 days after the rulemaking process is completed. *See* 5 U.S.C. § 702-3 (2000); Exchange Act § 25(b)(1); 15 U.S.C. § 78y(b)(1) (2000). The jurisdiction of the court of appeals is exclusive, and the findings of the SEC are conclusive if supported by substantial evidence. *See* Exchange Act § 25; 15 U.S.C. § 78y (2000).

Mr. Britton failed to follow the prescribed process. As a result, the district court properly concluded that it lacked subject matter jurisdiction to consider his declaratory judgment claims.[2]

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2. In addition to failing to exhaust his administrative remedies, Petitioner failed to demonstrate that the NYSE is an "employer" under Title VII of the Civil Rights Act of 1964. Title VII prohibits (Cont'd)

II.

PETITIONER'S CLAIMS AGAINST THE EXCHANGE HAVE BEEN RELEASED BY A SETTLEMENT AGREEMENT

In any event, Petitioner's claims against the Exchange were barred by the settlement agreement that Petitioner executed in favor of the Exchange. On March 16, 1992, DLJSC and Petitioner executed the Settlement, Release,

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(Cont'd)
employers from failing or refusing to hire or discharging any individual on the basis of a number of characteristics, including race. *See* 42 U.S.C. § 2000e-2(a) (2000). By its definition, Title VII does not apply to entities that might have employees of their own but are not being sued in their capacity as an employer. Thus, NYSE and Mr. Willsen do not come within the scope of Title VII because Petitioner was never employed by, nor sought employment with, NYSE or Willsen. *See, e.g., Rutherford v. SEC*, 842 F.2d 214 (9th Cir. 1988); *Equal Employment Opportunity Comm'n v. Waterfront Comm'n of N.Y. Harbor*, 665 F. Supp. 197 (S.D.N.Y. 1987); *Lavender-Cabellero v. Dep't of Consumer Affairs*, 458 F. Supp. 213 (S.D.N.Y. 1978).

Petitioner cites *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572 (9th Cir. 2000) ("*AMAE*"), to support his proposition that "Title VII is applicable when the right to employment is adversely affected by third parties, even in the absence of an employer-employee relationship." (Pet. at 13-14.) *AMAE*, however, cannot be read so broadly. In *AMAE*, Title VII was held to apply to the relationship between the State of California and teachers who were subject to state examination requirements that would determine their employability with local school districts. The court held that the state's involvement in the operations of the local school districts, which included the control and funding of local school district budgets by the state, reflected a "peculiar degree of control . . . over local school districts" that warranted a determination that Title VII applied. 231 F.3d at 581.

Covenant Not to Sue, Waiver, and Non-Disclosure Statement pursuant to which DLJSC paid Petitioner $150,000 "[i]n full and complete satisfaction of any and all claims against [DLJSC] and NYSE." (Pet. App. at 34a.) The release Petitioner granted to DLJSC and NYSE was broad and complete, releasing the two "from any and all liability" for claims:

> arising in connection with . . . his application for registration with NYSE, or any and all other acts that may have violated his rights . . . which could arise under any federal, state or local labor, employee benefit or fair employment practice law, or any civil rights law including, but not limited to, *Title VII of the Civil Rights Act of 1964*, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the *U.S. Constitution* . . . or any other local, state or federal claim or any other duty or obligation of any kind or description.

(Pet. App. at 34a–35a (emphasis added).) The district court concluded that the settlement agreement had not been breached and, therefore, refused to order its rescission. (*See* Pet. App. at 5a–6a.) By entering into the settlement agreement, Petitioner forfeited his right to proceed against the NYSE.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 19 2001
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(6)

No. 00-1080

In The

Supreme Court of the United States

RANDY BRITTON,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, AND JOHN R. WILLSEN,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

REPLY TO BRIEFS IN OPPOSITION

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EXCEPTIONS TO THE EXHAUSTION REQUIREMENT: FUTILITY AND CONSTITUTIONAL QUESTIONS

There are over 500,000 Registered Representatives and 2,000 Broker-Dealers who will be directly affected by this Court's decision in this case. Title VII of the Civil Rights Act of 1964, as interpreted by the Ninth Circuit in *Gregory v. Litton Systems*, 316 F. Supp. 401, 403 (C.D. Ca. 1970) *affirmed* 472 F.2d 631 (9th Cir. 1972), prohibits an employer from asking an employee whether he or she has ever been arrested for anything that did not result in a conviction. Yet, SEC Rule 17a-3(a)(12)(i)(g) requires employers, without any immunity from Title VII or state employment discrimination lawsuits, to conduct the illegal arrest record inquiry. State anti-discrimination employment laws prohibit the arrest record inquiry, and they provide for damages. In New York, Courts allow $7,500 per illegal question. *Sheriff's Department v. State Div. of Human Rights*, 129 A.D.2d 789, 791, 514 N.Y.S.2d 779, 781 (1987). The nation deserves an answer to this contradiction because an employer cannot simultaneously meet these conflicting federal and state mandates: securities industry employers are faced with conflicting directives that put them in violation of federal securities laws if they fail to make the illegal arrest record inquiry, and in violation of state and federal anti-discrimination employment laws if they do.

In 1975, the SEC determined that SEC Rule 17a-3(a)(12)(i)(g), a federal regulation, trumped Title VII of the Civil Rights Act of 1964, a federal statute, because the SEC determined that the arrest record inquiry, although outlawed by Title VII and state anti-discrimination laws, could be legally required by federal regulation.[1] It is hornbook law that federal statutes trump federal regulations[2], if they con-

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[1] *Order Approving Change to SEC Rule 17a-3*, Exchange Act Release No. 11615, 7 SEC Docket 710, 1975 SEC LEXIS 951 (August 25, 1975).

[2] *Contini v. Hyundai Motor Company*, 840 F. Supp. 22, 24 (S.D.N.Y. 1993)("To hold a federal regulation binding if a federal statute expressly states the contrary, would, however, violate federal law contrary to the Supremacy Clause contained in Article VI § 2 of the Constitution.")

flict, as they do here, so SEC Rule 17a-3(a)(12)(i)(g) cannot stand in opposition to Title VII of the Civil Rights Act of 1964. When the SEC amended SEC Rule 17a-3(a)(12)(i)(g) in 1975, it exceeded its statutory authority. Congress passed both the Civil Rights Act of 1964 and the 1975 Amendments to the Exchange Act of 1934. Pub. L. No. 94-29, 89 Stat. 97 (1975). While passing the 1975 Amendments, Congress was aware of the 1972 *Gregory v. Litton Systems* case which found that arrest record inquiries violated Title VII. That is why Congress set the statutory bar at *convictions* only. 15 U.S.C. § 78c(a)(39)(1999). The SEC is without statutory authority to change the conviction inquiry mandated by Congress to an arrest inquiry mandated by the SEC. Had the SEC stayed within the bounds set by Congress, and sought convictions only in SEC Rule 17a-3(a)(12)(i)(g), there would be no conflict between federal securities law and federal employment law because Title VII bars arrest inquiries, not conviction inquiries.

State anti-discrimination employment law, which also prohibits arrest inquiries, cannot be pre-empted especially when it outlaws the same acts as a federal statute, Cf. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 108, 103 S. Ct. 2890, 2906 (1983), because any Federal law attempting to cause, foster, or condone racial discrimination would violate the 5th and 14th Amendments. *Reitman v. Mulkey*, 387 U.S. 369, 381, 87 S.Ct. 1627, 1634 (1967); *Bell v. Maryland*, 378 U.S. 226, 292, 84 S. Ct. 1814, 1850 (1964)(Goldberg, Douglas, JJ., and Warren, C.J., concurring)("The Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil Rights Act of 1866, 14 Stat. 27, and to place that legislation beyond the power of congressional repeal.")

The NASD concedes that "[q]uestion 22B [on the 1990 Form U-4 I submitted] is mandated by SEC Rule 17a-3(a)(12)(i)(g) . . . ." NASD Opp. Page 2. This concession strengthens my state action argument, *Desiderio v. NASD*, 191 F.3d 198, 206 (2nd Cir. 1999), because it means that the race discrimination that results from the non-conviction in-

quiry is mandated by the state. State mandated race discrimination violates the equal protection clause. *Lugar v. Edmondson Oil, Co.*, 457 U.S. 922, 937 (1982). Because the SEC exceeded its statutory authority and ignored an EEOC ruling that the NYSE's arrest record inquiry violates Title VII, page 1a, the SEC's racial discrimination must be deemed intentional. The NYSE also ignored the EEOC's ruling, page 2a, but it sent the documents to the SEC. Page 3a.

State Anti-Discrimination/Fair Employment Laws are incorporated by reference into Title VII's federal regulatory scheme. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 477, 102 S. Ct. 1883, 1895 (1982)("state fair employment practice laws are explicitly made part of the Title VII enforcement scheme"). Therefore, on the pre-emption battlefield, state anti-discrimination employment laws are encased in federal, not merely state, armor. Only a change in the U.S. Constitution that makes racial discrimination legal can set up an environment whereby a state anti-discrimination employment law can be pre-empted, repealed, or rendered impotent.

Nevertheless, by using a combination of standing and subject matter jurisdictional defenses, the SEC has avoided judicial scrutiny of the illegal arrest record inquiry, on the merits, for over 25 years. The EEOC determined that the securities industry's arrest record inquiry violated Title VII back in 1974, page 1a, but it has taken this long for someone to bring this issue to this Court's attention. Justice Ginsburg made an initial inquiry into this issue while she sat on the D. C. Circuit Court of Appeals, but Justice Ginsburg stopped short of a ruling because all of the plaintiffs were white and there were no allegations of racial discrimination (this is a prime example of the SEC's standing defense). *Association of Investment Brokers v. SEC*, 676 F.2d 857, 861 n.11 (D.C. Cir. 1982)("Petitioners do not complain of any adverse racial impact occasioned by the arrest question.") However, Justice Ginsburg did cite the *Gregory v. Litton Systems* decision for the proposition that the arrest record inquiry is illegal and will be enforced, if an African-American sues. After two trips to the Circuit Courts, an EEOC ruling, and 8 years of

litigation in this case, it is clear that the SEC has no intention of changing SEC Rule 17a-3(a)(12)(i)(g).

This explains why it is futile to exhaust my administrative remedies before the SEC. If the SEC will not listen to the EEOC or Justice Ginsburg, it is clearly futile for me to re-argue the same points that the EEOC and Justice Ginsburg have already made. Accordingly, access to the Courts without exhausting my administrative remedies is appropriate because the Courts will not require futile attempts to re-litigate before an agency that has already ruled against the points offered and is actively enforcing the rule. *Houghton v. Shafer*, 392 U.S. 639, 640, 88 S. Ct. 2119, 2120 (1968); *Guitard v. U.S. Secretary of Navy*, 967 F.2d 737, 741 (2nd Cir. 1992)("Exhaustion of administrative remedies may not be required when: [1] administrative appeal would be "futile"; and [2] in certain instances a plaintiff has raised a "substantial constitutional question.") Whether the illegal arrest record inquiry mandated by the SEC, with its attendant intentional racial discrimination, violates the equal protection clause is a substantial constitution question. Whether information requests from the NYSE and the NASD are constrained by the Self Incrimination Clause of the Constitution is also a substantial constitutional question, which, when coupled with the futility of appealing to the SEC, excuses my failure to exhaust my administrative remedies with the SEC.

Because of the SEC's usurpations, the NYSE and the NASD do not believe that Title VII of the Civil Rights Act of 1964 or the Constitution applies to them even though they have the power to "interfere" with employment opportunities on Wall Street. The holding of this Court must tell them the truth: no one is above the law. See the NYSE letter at page 2a, which is a part of the 1975 SEC Rule 17a-3 file, which explicitly espouses the "above the law" point of view.

Clearly, something is rotten on Wall Street when DLJ claims to have fired me for alleged misconduct, and then DLJ pays me $150,000, notwithstanding my *alleged* misconduct, to keep quiet. My alleged misconduct included (1) allegedly lying on an employment form (Form U-4 question

22b) by leaving off Maloney's[3] trumped up assault charges as I am permitted to do by Massachusetts and New York law, (2) refusing to supply a written statement to DLJ and the NYSE concerning the nature and circumstances surrounding favorably closed, non-investment related, misdemeanor arrests and charges that did not result in a conviction as I am permitted to do by the Self Incrimination Clause of the Fifth Amendment as well as state anti-discrimination employment law, and (3) alleged insubordination when I wrote a letter, page 4a, refusing to supply the illegally requested information that informed DLJ and the NYSE that I would be standing on my rights. As explained in the Petition with irrefutable syllogistic logic, Pet. page 27, I did not lie on the Form U-4 and *all* of my actions are protected activity under state and federal constitutional and anti-discrimination employment laws.

> No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Mass. Gen. L. Ch. 151B, § 4 ¶ 9 (1991)(This statute prohibits the arrest inquiry).

CONFLICTS BETWEEN THE CIRCUITS

Whether the NYSE and the NASD are state actors or not determines whether the NYSE and the NASD must comply with constitutional strictures, including the prohibition on compelling a citizen to testify against himself without any offer of use immunity before the statute of limitations has run on the underlying arrests/charges. Following well-settled Second Circuit precedent, which conflicts with the Ninth and the Seventh Circuits, the Second Circuit held that

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[3] See U.S. Supreme Court Docket Number 00-1568 which recounts my $200,000 federal jury malicious prosecution victory over a rogue Boston Police officer, Patrick J. Maloney.

the NYSE and the NASD are private entities. *United States v. Solomon*, 509 F.2d 863, 871 (2nd Cir. 1975)(NYSE is not a state actor) and *Desiderio v. NASD, Inc.*, 2 F. Supp. 2d 516, 519 (S.D.N.Y. 1998)("NASD is not a state actor"). These cases were wrongly decided as they did not follow this Court's three-prong test for finding state action by private parties. *Duffield v. Robertson Stephens & Company*, 144 F.3d 1182, 1200-1201 (9th Cir. 1998) *quoting Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777 (1982); *R. J. O' Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257, 262 (7th Cir. 1995)(National Futures Association "was a government actor in performing the registration function"). The Ninth Circuit's *Duffield* opinion states that it is clear that the NYSE and the NASD have been state actors since at least 1993 when SEC Rule 15b7-1 was passed. Some commentators argue for state action based on the 1975 Amendments to the Exchange Act of 1934. Pamela R. Chepiga, *The Right to Exercise Fifth Amendment Privilege in Exchange and SRO Investigations: A Time for Re-Examination*, 648 PLI/Corp 797 (June 15, 1989).

Magistrate Judge Lee cited Second Circuit authority for the proposition that the NYSE and the NASD are not subject to the strictures of Title VII of the Civil Rights Act of 1964 when there is no direct employer-employee relationship. *Neither the District Court nor the Second Circuit objected to Magistrate Judge Lee's analysis, thereby adopting same.* This holding conflicts with the Ninth Circuits holding in *The Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 580 (9th Cir. 2000)(en banc) *citing Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 202 (3d Cir. 1994); *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 876-77 (6th Cir. 1991); *Pardazi v. Cullman Med. Ctr.*, 838 F.2d 1155, 1156 (11th Cir. 1988); and *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 722 (D.C. Cir. 1978). As can be seen from the above citations, the Third, Sixth, Ninth, Eleventh, and the D.C. Circuits conflict with the Second Circuit's holding that only a direct employer can violate Title VII of the Civil Rights Act of 1964. All of the above cases have followed the "interference" model first articulated in *Sibley*. Under NYSE Rule 308

(1991), the NYSE can veto the hiring of employees by its member Broker-Dealers. Congress intends that the power to veto employment opportunities be constrained by Title VII of the Civil Rights Act of 1964.

Another conflict between the Circuits lies in whether the mere filing of a Form U-5, without more, is a step in a NASD or a NYSE quasi-judicial proceeding. Judge Wood and the Second Circuit have taken the position that the mere filing of a Form U-5 is a step in the quasi-judicial process that cloaks *all* Form U-5's with absolute privilege. Pet. page 22a. This position is at odds with both the Sixth and the Seventh Circuits. *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 137 (6th Cir. 1996)("The submission of a Form U-5, however, is not part of the NASD's quasi-judicial regulatory process.")

FORM U-5

If the mere filing of a Form U-5 is not a part of the NYSE's and the NASD's quasi-judicial proceedings, then the Form U-5 submitted in my case is not entitled to absolute privilege. There is overwhelming evidence to support malice so it will be easy to overcome DLJ's qualified immunity defense. If the constitutional restraints on state actors are applied to the NYSE and its rules and regulations, as is required by law so that it passes constitutional muster, *Rust v. Sullivan*, 500 U.S. 173, 190 (1991), then it is clear that no NYSE rule or regulation, including NYSE Rule 476, required my disclosure of information that is protected by the Self Incrimination Clause of the Fifth Amendment. Therefore, the Form U-5 which states that I was terminated for "inability to comply with NYSE regulations" is false. In any event, "inability" is false because, at most, "unwilling" is fair.

Because of the devastating blackballing effect that a false Form U-5 has on one's career in the securities industry, *Baravati v. Josephthal, Lyons & Ross, Inc.*, 28 F.3d 704, 708 (7th Cir. 1994), and the amount of money that I could have made, my damages are at least six-figured and perhaps in the eight figure range. *See E.g., Waite v. Dean Witter Reynolds, Inc.*,

1990 WL 463825 (False Form U-5 alleging violations of Exchange rules caused jury to award 23 million dollars).

FEDERAL QUESTIONS

DLJ does not claim that NYSE or NASD Rules and Regulations required DLJ to file the Form U-5. DLJ has cited footnote 2 to NASD Notice to Members 92-19 for the first time, but that footnote does not say what DLJ claims. It merely specifies that a Form U-5 is the NASD's designated Form. It does not alter the fact that Form U-5's are not required to be filed unless an individual has registered or at least taken and passed an Exam. In fact, NASD Notice to Members 76-43 states that DLJ "should not" have filed a Form U-5 in my case because I had neither registered nor taken and passed the Series 7 Examination. Once the SEC approves an NASD rule, the NASD has no power to amend its own rules without SEC approval. 15 U.S.C. § 78s(b)(1). The SEC has not approved a change to NASD Notice to Members 76-43.

Although not itself approved by the SEC, NASD Notice to Members 76-43 is a valid federal rule because when it was issued on December 27, 1976, it was reasonably and fairly implied by an existing rule of the NASD, namely the 1976 version of NASD by-law Art IV § 3(a); therefore, it did not need to be specifically approved by the SEC. 17 C.F.R. § 240.19b-4(c)(1). Once established as a NASD policy, however, NASD Notice to Members 76-43 is elevated to Federal NASD Rule status. 15 U.S.C. § 78c(a)(27) (defining "rule" to include "stated *policies*, practices, and interpretations"). 17 C.F.R. § 240.19b-4 defines "stated *policies*, practices, and interpretations" to include "any *statement* made generally available to the membership of . . . the self regulatory organization . . . that establishes or changes any standard, limit, or guideline with respect to: (i) the rights, obligations, or privileges of specified persons . . . or (ii) the meaning, administration, or enforcement of an existing rule." As a federal rule, NASD Notice to Members 76-43 is just as binding on the parties and this Court as if it were a federal regulation or statute. *Queens Penn Corporation v. Mazzucco*, 19 Misc. 2d 567, 568, 187 N.Y.S.2d 313, 315 (Sup. Ct. 1959)(A

Federal *rule* or regulation has the authority of statute and is as binding and effective as though enacted by Congress. . ..")

Because NASD Notice to Members 76-43 states that a Form U-5 should not be submitted in my case, DLJ violated federal securities law when it filed the Form U-5 in my case. Because New York and Federal law is incorporated by reference into the settlement agreement, DLJ materially breached ¶ 9 of the settlement agreement so rescission is appropriate.

It is also important to note that Judge Wood's Order, which the Second Circuit has adopted, assigns an absolute privilege to the Form U-5 *solely* because the statements are allegedly required by the NYSE and not because they were made in the course of a quasi-judicial proceeding *because there was no quasi-judicial proceeding*. Under New York law, a Form U-5, submitted pursuant to a legal duty, only rates a qualified privilege: the Second Circuit's *Fahnestock* opinion cites three New York Court of Appeals cases on point in support of its qualified privilege holding for Form U-5's. *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2nd Cir. 1991) citing *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 166, 405 N.Y.S.2d 1, 5 (1978); *Mihlovan v. Grozavu*, 72 N.Y.2d 506, 509, 531 N.E.2d 288, 289, 534 N.Y.S.2d 656, 657 (1988) (per curiam), *Shapiro v. Health Ins. Plan of Greater New York*, 7 N.Y.2d 56, 60, 163 N.E.2d 333, 336, 194 N.Y.S.2d 509, 512-13 (1959). The Second Circuit panel that heard my case ignored these controlling New York and Second Circuit precedents.

Whether or not the filing of a Form U-5 is a step in the NASD's quasi-judicial process is the key question to be decided because it is clear that, under New York Law, a Form U-5 cannot gain absolute privilege status merely because it was submitted pursuant to a legal duty.

RESPONDENTS' MINOR POINTS

DLJ claims that the state actor question was not preserved below. This is not true. I have continually challenged the constitutionality of Willsen's arrest record inquiry. In my November 6, 1991 letter to Willsen and DLJ, I challenged the constitutionality of Willsen's inquiry. See page 4a. The November 6, 1991 letter was attached to the amended com-

plaint so the allegations raised in the November 6, 1991 letter are a part of the complaint for all purposes. Fed. R. Civ. P. 10. Even, the District Court gave me credit for opposing the arrest record inquiry on constitutional grounds. Pet. page 24a. In my brief to the Second Circuit at pages 21-34, I explicitly argue that "The NYSE and the NASD are State Actors who Must Abide by Constitutional Strictures." In these 13 pages, I attack the Second Circuit's holding in *Solomon*. The state actor issue was explicitly preserved below.

It is clear that Willsen is not listed in the settlement agreement as a third-party beneficiary, so Willsen is not protected by the settlement agreement in any event. It is also clear from the complaint and its attachments that Willsen was sued because he inquired about non-conviction arrests/ charges in violation of New York State anti-discrimination employment law. Magistrate Judge Lee had no trouble culling these facts from the first amended complaint, Pet. page 29a-30a, but Magistrate Judge Lee later said that these facts do not state a claim, Pet. page 58a-59a, even though these facts clearly state a claim under N.Y. Exec. Law §§ 296[6], 296[16]. Section 296[16] prohibits non-conviction arrest record inquiries, and Section 296[6] prohibits Willsen from encouraging DLJ to fire me for opposing their unlawful discriminatory practices. These claims were stated in the first action, so res judicata is inapplicable to Willsen.

CONCLUSION

This Court should grant certiorari to clear up the conflicts between the Circuits and to resolve the catch-22 that pits Title VII, and its incorporated state anti-discrimination employment laws, against SEC Rule 17a-3(a)(12)(i)(g).

Respectfully submitted,

RANDY BRITTON, MBA, CPA
Pro Se
3214 Lexington Ridge Drive
Lexington, MA 02421-8309
(781) 861-9297

APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

March 6, 1974

Mr. Stanley Mazaroff
Venable, Baetjer and Howard
Attorneys-at-Law
1800 Mercantile Bank & Trust Building
Baltimore, Maryland 21201

Dear Mr. Mazaroff:

This is to acknowledge receipt of a copy of your letter to Mr. Robert M. Bishop regarding the New York Stock Exchange Rule on the use of arrest records.

The aforementioned rule is in violation of Title VII of the Civil Rights Act of 1964, as amended.

If we can be of assistance in this matter, please let us know.

Sincerely,

William A. Carey
General Counsel

By: Issie L. Jenkins
Associate General Counsel
Legal Counsel Division

BEST AVAILABLE COPY

Mr. Stanley Mazaroff
Venable, Baet[j]er & Howard
1800 Mercantile Bank & Trust Building
2 Hopkins Plaza
Baltimore, Md. 21201

March 13, 1974

Dear Mr. Mazaroff:

This is in response to your letter of February 14, 1974 inquiring about the Exchange's requirement concerning arrests, in light of the EEOC Decision in this area.

The requirement outlined in Rule 345.19 is consistent with S.E.C. Rule 17A3 which is promulgated under the Securities and Exchange Act of 1934. This rule states that a broker/dealer, as defined under 17A3(a), must make and keep a questionnaire or application for employment executed by each "associated person" (associated person is defined in subdivision H(ii)[)] and that it shall contain at least all the information outlined in (h) of the Rule, which includes "a record of any arrests, indictments or convictions for any felony or misdemeanor, except minor, traffic offenses."

In regard to EEOC Decision No. 72-1460 (March 19, 1972), CCH EEOC Decisions (1973) Paragraph 6341; Gregory v. Litton Systems, Inc., 316 F. Supp. 401, the Commission determined that in the particular circumstances of that case the employer engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964. This decision would not of course, necessarily be applicable to the broker-dealer community in light of the existing rules of the self-regulatory organizations and of the Security and Exchange Commission itself and the practical necessity which faces each broker-dealer employer to comply with those rules. Consequently whether or not Title VII of the Civil Rights Act of 1964 renders unlawful the request for arrest information under Exchange Rule 345.19 or SEC Rule 17A3(12) is, so far as we are aware, undecided.

It may interest you to know that the whole matter of arrests is currently under review by the staff of the Securities and Exchange Commission.

I trust that the above answers your questions.

Very truly yours,

(Signed) Robert M. Bishop

Robert M. Bishop
Senior Vice President

PKowalewski:hm

THE New York Stock Exchange

RECEIVED
OFFICE OF THE SECRETARY
JUN 23 1975

Mr. George A. Fitzsimmons
Secretary
Securities and Exchange Commission
500 North Capitol Street, N.W.
Washington, D. C. 20549

June 23, 1975

Re: File No. 57-563

We have had an opportunity to review the proposed amendment of Rule 17a-3(a)(12)(A)(8) under the Securities Exchange Act of 1934, modifying the requirement for the maintenance of arrest records by broker/dealers.

The Exchange believes that the attached correspondence, including an opinion from the Equal Employment Opportunity Commission, concerning arrest records, may be of assistance to the Commission in arriving at its decision to amend Rule 17a-3.

We appreciate your affording us the opportunity to comment on this proposal.

Very truly yours,

J. C. Buck

Attachment

Donaldson, Lufkin & Jenrette

Donaldson, Lufkin & Jenrette Securities Corporation • 140 Broadway, New York, NY 10005 • (212) 504-3000

Randy A. Brillen
Associate
DLJ Public Finance Division
(212) 504-3482

November 6, 1991

To: John R. Willsen
Senior Registration Specialist
Qualifications and Registrations
20 Broad Street
New York, NY 10005

Thru: Mr. Thomas Lee
Vice President/Director of Employment
Donaldson, Lufkin & Jenrette Inc.
140 Broadway
New York, NY 10005

Dear Sir:

I flatly refuse to furnish the information and/or documentation requested in Mr Willsen's letters to Tom Lee and/or in Mr. Rigg's memorandum to me. (These documents are attached.)

Neither the New York Stock Exchange nor Donaldson, Lufkin & Jenrette, Inc. has the authority to legally compel my disclosure of this information. I have asked repeatedly for the citation of the authority DLJ or the NYSE thinks it has to compel this disclosure, but only NYSE Rule 308 has been given, and it's not conclusive authority to request this information. (Needless to say, I was angry to find out that my job offer may be subject to the approval of a third party, the NYSE, 5 months after I have been performing the job. That should have been disclosed in the offer letter, if indeed my offer was contingent on the approval of a third party.) I have been threatened with disciplinary action, including summary procedures for the imposition of fines, pursuant to Exchange Rule 476A. I am disappointed that DLJ has chosen to side with the NYSE in this matter, especially given the circumstances under which I was hired. You have hardened my resolve to defy both the NYSE and DLJ. I believe that it is in the best interests of both DLJ and the NYSE to close this inquiry, before this matter escalates into a civil lawsuit with possible criminal and/or discriminatory charges being filed against the NYSE and/or DLJ. If I am in error, please send me a copy of the authority so that what appears to me to be an unconstitutional and statutorily illegal request can be legally responded to by me. I reiterate my desire to comply with all of the Laws, Regulations, and Rules governing my employment, but I also require that DLJ and the NYSE do no less.

I suspect someone from DLJ had better talk to me about this with an apology and the documents I requested in hand. This is wrong behavior, and I have made it my goal to make sure that it NEVER HAPPENS AGAIN TO ANYONE ELSE. My case wouldn't read well on the front page of the Wall Street Journal, New York Times, and/or USA Today. You can't give someone an unqualified offer letter on 20 Feb 91, and wait until they show up for their first day of work on 20 May 91 and demand that they submit to fingerprinting without having told them that the fingerprints will be used to actually check FBI files. New Department of Justice Regulations, for the first time, effective 6 Sept 1990, mandate that the applicant be told that a FBI records check will be conducted. See the new regulations concerning fingerprints that are attached. In addition, on the first day of work, I was forced to submit to a background and credit check. The drug test was demanded one week after I received the offer letter which did not disclose that any of this nonsense had to take place. In fact, when I asked the question